[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 273

MARGARET C. LYNCH, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF E. J. LYNCH, DECEASED, PETITIONER

vs.

ALWORTH-STEPHENS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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[Caption omitted.]

1 In United States Circuit Court of Appeals, Eighth Circuit

ALWORTH-STEPHENS COMPANY, PLAINTIFF AND respondent
vs.
MARGARET C. LYNCH, EXECUTRIX OF THE LAST WILL and testament and of the estate of E. J. Lynch, deceased, substituted as defendant in the place of said E. J. Lynch as collector of internal revenue for the district of Minnesota, deceased, defendant and appellant

Stipulation re printing of exhibits

Filed June 26, 1923

It is hereby stipulated and agreed by and between the parties to the above entitled action that as a part of the record upon which said action may be heard and determined in the Circuit Court of Appeals, Eighth Circuit, the clerk of said court may print and make a part of the record upon said appeal the following exhibits, which were offered and received in evidence upon the trial of said case, to-wit:

Plaintiff's Exhibit 1: Stipulation of facts, also copies of mining contracts, leases, etc.

Plaintiff's Exhibit 2: Income tax return of Alworth Stephens Company for the year 17, 18, and 19 and claims for refund.

Plaintiff's Exhibit 3: Statement of iron ore shipped from Hudson and Perkins mines from 1913 to 1919.

Plaintiff's Exhibit 4: Letter from Treasury Department, U. S., to Alworth-Stephens Company.

Plaintiff's Exhibit 5: Letters from Department of Justice to W. D. Bailey and correspondence from W. D. Bailey to Department of Justice.

Plaintiff's Exhibit 6: Letter from Treasury Department, U. S., to Alworth-Stephens Company and copy.

Plaintiff's Exhibit 7: Letters from Treasury Department, U. S., to Alworth-Stephens Company and copy.

2 Plaintiff's Exhibit 8: Letter from Treasury Department, U. S., to Alworth-Stephens Company.

Plaintiff's Exhibit 9: Letter from Treasury Department, U. S., to Alworth-Stephens Company.

Plaintiff's Exhibit 10: Letter from Alworth-Stephens Company to internal revenue collector.

Plaintiff's Exhibit 11: Letter from Treasury Department, U. S., to Alworth-Stephens Company.

Plaintiff's Exhibit 12: Letter and reply from Treasury Department, U. S., to Alworth-Stephens Company.

Plaintiff's Exhibit 13: Letter from U. S. Treasury Department to Alworth-Stephens Company and reply.

Defendant's Exhibit AA: Copies of corporation income tax returns for the years 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916.

Defendant's Exhibit BB: Certificate of N. A. Nelson, secretary of Minnesota Tax Commission, certifying that statement attached is a true and correct record of shipments from Hudson & Perkins mines.

Defendant's Exhibit CC: Statement of shipment of tonnages from Perkins mine from May 1, 1913, to May 1, 1914.

WASHBURN, BAILEY & MITCHELL,
Attorneys for Plaintiff and Respondent.
LAFAYETTE FRENCH, Jr.,
U. S. Attorney and Attorney for Defendant-Appellant.

(File endorsement omitted.)

3 In United States District Court, District of Minnesota, Fifth Division

ALWORTH-STEPHENS COMPANY, PLAINTIFF
vs.
MARGARET C. LYNCH, EXECUTRIX OF THE LAST WILL and testament and of the estate of E. J. Lynch, deceased, substituted as defendant in the place of said E. J. Lynch as collector of internal revenue for the district of Minnesota, deceased, defendant

Appearances:

Messrs. Washburn, Bailey & Mitchell, Duluth, Minnesota, attorneys for the plaintiff;

Lafayette French, jr., United States attorney for the district of Minnesota; and

Newton K. Fox, attorney of the Treasury Department, attorneys for the defendant

Complaint

Filed March 9, 1920

[Title omitted.]

Comes now the plaintiff and for a cause of action against the defendant alleges and shows to the court as follows:

4 1. That the plaintiff is and ever since about the year 1907 has been a corporation organized, created, and existing under and by virtue of the laws of the State of Minnesota.

2. That the defendant is and ever since prior to January 1st, 1917, has been the collector of internal revenue for the United States Government in and for the district of Minnesota.

3. That this plaintiff was organized as a corporation for the purpose of taking an option for mining lease upon certain lands upon

the Mesaba Iron Range in Minnesota, which had been arranged for and agreed upon by the organizers of said corporation prior to the incorporation of the plaintiff, and which option was transferred to the plaintiff corporation immediately upon its organization.

4. That pursuant to said option and some years prior to the first of March, 1913, this plaintiff had taken from the fee owners of said property a mining lease or contract upon the southwest quarter of the northwest quarter (SW. ¼ of NW. ¼) and the northeast quarter of the southwest quarter (NE. ¼ of SW. ¼) of section twenty-six (26), township fifty-nine (59), range fifteen (15), St. Louis County Minnesota, running for a period of fifty years from August 25th, 1908, and providing for the taking over and purchase of the ore in said property at the rate of at least fifty thousand (50,000) tons per year and at a royalty and purchase price therefor of thirty cents (30c.) per ton.

5. That at the time this plaintiff acquired said lease, pursuant to said option, all the ore in said property had been proven up and the amount thereof was accurately and definitely known at said time, and that at approximately the same time it acquired said lease it subleased and contracted said property to Perkins Mining Company for a period of twenty-five (25) years from September 1st, 1908, and said Perkins Mining Company agreed to pay said plaintiff for said ore seventy-five cents (75c.) a ton royalty and to pay for not less than fifty thousand (50,000) tons thereof during each and every year of said lease, and the said property thereupon became known as the Perkins mine, and that the overburden upon the ore therein was stripped and the same became an open-pit mine, and said ore was fully developed and measured up some years prior to March 1st, 1913, and the said property is herein referred to as the Perkins mine.

6. That several years prior to the first of March, 1913, this plaintiff, pursuant to the said option of this plaintiff from the fee owners, took from the fee owners a mining lease or contract, running for fifty (50) years from the 12th day of March, 1909, upon the northwest quarter of the northwest quarter (NW. ¼ of NW. ¼) of section four (4), township fifty-eight (58), range fifteen (15), St. Louis County, Minnesota, under which it agreed to pay the fee owners for the ore in said property thirty cents (30c.) per ton and to pay for not less than twenty-five thousand (25,000) tons per year during each year of said lease.

7. That several years prior to the first of March, 1913, this plaintiff granted to the Syracuse Mining Company a sublease or contract upon said mine, running for the balance of the term of the plaintiff's lease, commencing with the 12th day of March, 1909, and providing for the sale of the ore in said property at the rate of sixty cents (60 c.) per ton royalty, with a provision that at least fifty thousand (50,000) tons per year should be paid for, and the said property was, several years prior to March 1st, 1913, stripped and the overburden taken therefrom, and all of the ore therein proved

up and developed, ready for mining, and that said property became known, and is herein referred to, as the Hudson mine.

8. That said two pieces of property constitute the only property of any substantial value that this plaintiff has ever owned.

9. That upon the first of March, 1913, this plaintiff, as to both of said properties, was therefore paying for the ore in said properties to the fee owners at the rate of thirty cents (30 c.) per ton on both of said properties, and on said Perkins property was obtaining an additional forty-five cents (45 c.) per ton royalty from the company to which it had sold the ore, and was obtaining an additional royalty of thirty cents (30 c.) per ton upon said Hudson property from the company to which it had sold the ore therein.

10. That the actual cash value of this plaintiff's interest in said Perkins property on the first day of March, 1913, was not less than $184,768.18, and on said Hudson property was not less than $210,674.53, or a total of $395,442.71, and the interest and ownership of the plaintiff in said properties on said date, March 1st, 1913, were worth at least said amounts.

11. That such mining properties are almost invariably sold and handled through such mining leases or contracts for the sale and purchase of ore.

6 12. That upon the first day of March, 1913, said properties having already been developed and the overburden stripped from the ore therein, it was practically certain that all of the iron ore in said properties would be mined out at least as fast as in equal annual installments during the period of seven years, or by the first of January, 1920, there being upon such open pit properties no mining ever conducted in the winter months, and that upon said basis, the then present value of the plaintiff's interest in said properties upon a six per cent per annum basis was somewhat upwards of eighty per cent (80%) of the total amount of royalties that would be paid to the plaintiff for all of the ore in said properties. Or, in other words, the then present value March 1st, 1913, of every dollar that this plaintiff would net out of said properties as the purchase price of the ore therein was somewhat upwards of eighty cents (80 c.), and the then present value to this plaintiff of each ton of ore in the Perkins property was eighty per cent (80%) of the forty-five cents (45 c.) per ton net which this plaintiff realized thereon, or thirty-six cents (36 c.) per ton, and the then present value of each ton of ore in said Hudson property was eighty per cent (80%) of the thirty cents (30 c.) per ton net which this plaintiff was realizing therefrom, or twenty-four cents (24 c.) per ton, which latter rates per ton amount to the same thing as the above mentioned simple way of reckoning that for every dollar that this plaintiff would net in royalties out of said properties, the then present value on March 1st, 1913, was eighty per cent (80%) or eighty cents (80 c.).

13. That upon the organization of said plaintiff company, twenty-five thousand dollars ($25,000.00) in par value of its capital stock were issued and were paid for in full by its stockholders, and none

of said stock has ever been cancelled or turned in to the treasury and is still outstanding.

14. That for the calendar year 1917 this plaintiff, in 1918, made out its income tax report and report upon the war excess profits tax and paid to the defendant, as collector of internal revenue for the United States Government, on the 10th of June, 1918, the sum of $10,253.21, of which $5,960.47 was paid as war excess profits tax and $4,292.74 was paid as income tax, but that said payments were made under demand and pressure from the defendant and from the Internal Revenue Department, which he represents, and under erroneous and improper regulations made by said department and erroneous and improper demands thereunder by said department as to the basis upon which this plaintiff was required to made payment, and
7 the returns of this plaintiff were induced by and made by it under said erroneous demands, regulations and rulings of the said department and because of its fear that its property would be seized and sold if the same were not complied with.

15. That thereafter the said defendant and the Department of Internal Revenue, which is represented through him, made additional demands upon this plaintiff for the payment of additional amounts, and after considerable correspondence and protest on the part of this plaintiff, the said defendant and the department of the Government represented by him required and demanded of this plaintiff that it pay an additional war excess profits tax of $17,128.44, which, pursuant to said wrongful demand, this plaintiff did pay to the said defendant on the 21st day of February, 1919, making the total paid by this defendant for income and war excess profits taxes for the calendar year 1917 of $27,381.65.

16. That at the time of making said payments this plaintiff protested to the said defendant and the department represented by him against the exaction of said tax and in April, 1919, duly filed its appeal to the Commissioner of Internal Revenue and claim for refund of the taxes erroneously exacted from this plaintiff and by it paid, and made its demand for a refund to the amount of $25,737.58 and set forth therein the basis for its demand, claiming therein that its capital surplus and undivided profits or invested capital, as of January 1st, 1917, was at least $124,333.88, as shown by its capital stock tax return, and upon which basis this plaintiff had paid its capital stock tax and upon which basis this plaintiff was entitled to said amount of refund.

17. That thereafter considerable negotiation was had between this plaintiff and the said defendant and the heads of the department represented by him, in reference to said matter, and this plaintiff, while still maintaining that it is entitled to the above mentioned amount of refund and that the defendant and the department represented by him have exacted from this plaintiff taxes to the amount of the said refund over and above the amount which was due from the plaintiff for said year 1917, yet, through such negotiations, recognized that there may be some fair doubt as to whether the plaintiff

is entitled in figuring war excess profits tax, to consider as invested capital more than the twenty-five thousand dollars ($25,000.00) of its capital stock, and not desiring to press that point for that year, waives it in the figures hereinafter alleged, which it states
8 shows the correct amount of tax which it should have paid and the amount of refund to which, beyond question, it is entitled.

18. This plaintiff further alleges that under the income tax law passed by the Congress of the United States on September 8th, 1916, and which was in effect during all of 1917, in the last paragraph of section 10 of Part II, relating to corporations, is contained the following provision:

"For the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition by a corporation, joint stock company, or association, or insurance company, of property, real, personal, or mixed, acquired before March 1st, 1913, the fair market value of such property as of March 1st, 1913, shall be the basis for determining the amount of such gain derived or loss sustained."

That section 12 of said law, relating to corporate income, provided for deductions and allowed a deduction as follows:

"b. In the case of mines, a reasonable allowance for depletion thereof, not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made, such reasonable allowance to be made in case of both (a) and (b) under rules and regulations to be prescribed by the Secretary of the Treasury; provided that when the allowance authorized in (a) and (b) shall equal the capital originally invested, or in the case of purchase made prior to March 1st, 1913, the fair market value as of that date, no further allowance shall be made."

19. That the total amount which this plaintiff received during the year 1917 on account of its net forty-five cents (45 c.) per ton interest in the Perkins property and its net thirty cents (30 c.) per ton interest in the Hudson property was $77,505.98. That within the above quotation from section 10 of said law and other provisions of said law, and under the facts above alleged, eighty per cent (80%) of said total amount, or $62,004.79, was not income or profits of this plaintiff at all, but on the contrary was return of capital assets, or a part of the value of this company's property as of the 1st of March, 1913. Or, figured in another way, under section 12 of said law, above quoted, if the said total amount which this plaintiff received is to be considered income, then this plaintiff is expressly authorized by the said section 12 of said law to deduct therefrom the
9 said eighty per cent (80%) as representing the fair market value on March 1st, 1913, of the product thereof which was mined and sold during the said year 1917.

20. That in truth and in fact the fair market value of each and every ton of ore in said Perkins mine on the 1st of March, 1913, and

also during all of 1917, was upward of seventy-five cents (75c.) per ton, and the fair market value on March 1st, 1913, of every ton of ore in said Hudson mine, and also during all of the year 1917, was upward of sixty cents (60c.) per ton.

21. That in truth and in fact all the ore in said Hudson mine was actually mined out in 1918 and all of the ore in said Perkins mine was mined out early in 1919, and the said ore in both of said properties was in fact mined and paid for, from the 1st of March, 1913, considerably faster than in seven equal annual installments for the ore existing in said properties on the 1st of March, 1913, from which it follows that the estimates of this plaintiff as of March 1st, 1913, as to the value of its interest in said properties and the rate of mining were more favorable to the Government than to this plaintiff.

22. That by reason of the facts aforesaid, this plaintiff has paid on the dates aforesaid, to the defendant a total of $27,381.65 on account of its income and war excess profits taxes for the calendar year 1917, whereas, on a proper basis of figuring and resolving all doubts in favor of the Government, by figuring as invested capital only the twenty-five thousand dollars ($25,000.00) actually paid into this plaintiff by its stockholders for stock issued to them, and figuring that only eighty per cent (80%) of the total returns to this plaintiff from said properties was the present value on March 1st, 1913, although that was somewhat less than the present market value March 1st, 1913, in fact was, and even reckoning on a seven-year basis for the completion of mining, although such basis was very much less than the present value in 1913 in fact was, as the mining operations were finally completed in considerably less than seven years, the maximum tax which the defendant and the Government were entitled to collect and which this plaintiff should have been required to pay is represented by the following figures, for the year 1917:

Total net returns to this plaintiff from net payments to it of 45c. on the Perkins and 30c. on the Hudson properties		$77,505.98
80% of this total, representing return of capital assets or depletion of ore properties		62,004.79
Balance, representing income		$15,501.19
Deductions from above income:		
7% on $25,000.00 invested capital	$1,750.00	
Statutory deduction allowed corporations	3,000.00	
		4,750.00
Balance of income after deductions		$10,751.19
$5,750.71=the amount of war excess-profits tax.		
Income as above		$15,501.19
Less excess profits tax		5,750.71
Balance income, subject to tax at 6%		$9,750.48
6% income tax on $9,750.48	$585.03	
Add on excess profits tax	5,750.71	
Total tax due	$6,335.74	
Total amount paid to defendant		27,381.65
Proper amount of tax on above figures		6,335.74
Overpayment, which should be refunded		$21,045.91

The plaintiff therefore alleged that it has paid to the defendant, for the use of the United States Government, on account of its income and war excess profits taxes for the calendar year 1917 $21,045.91 more than it was required under the law to pay and that the said payment was made under compulsion and duress and through erroneous rulings, regulations, and demands of the defendant and the Internal Revenue Department of the United States Government, which he represents.

23. The plaintiff further alleges that it had never, in its income or other tax returns to the Government, prior to the year 1919, taken allowances for depletion or deducted the allowance of capital assets or of capital to equal the value of its property and capital as of the 1st of March, 1913.

24. Plaintiff further alleges that even if the foregoing claims of the plaintiff might on any theory be held not sustained, that so far as its war excess profits taxes for the year 1917 are concerned, that it would then come under section 209 of the war revenue act of 1917, approved October 3rd, 1917, and in effect October 4th, 1917, by which it should be treated as having no invested capital or not more than a nominal capital and on which the limit of its war excess profits
11 tax would be a tax equivalent to eight per centum (8%) of its net income in excess of three thousand dollars ($3,000.00) allowed to domestic corporations as a specific deduction, and that it is entitled to a return from the defendant of all taxes paid by it, as above alleged, in excess of such amount.

25. That six months have elapsed since the appeal of this plaintiff to the Commissioner of Internal Revenue for refund and repayment of said excessive tax, and said Commissioner of Internal Revenue has, before the commencement of this action, disallowed said appeal and refused to make or recommend any such refund, and that this action is brought to obtain a refund of taxes paid under the internal revenue laws of the United States, being particularly the income and war excess profits laws.

Wherefore the plaintiff prays for judgment against the defendant for twenty-one thousand forty-five dollars and ninety-one cents ($21,045.91), with interest thereon as allowed by law, and the costs and disbursements of this action, and for such other and further or different relief as to the court may seem just and proper.

WASHBURN, BAILEY & MITCHELL,
Solicitors for the Plaintiff,
1200 Alworth Building, Duluth, Minnesota.

[File endorsement omitted.]

In United States District Court

Summons and marshal's return

Filed March 11, 1920

[Title omitted.]

The President of the United States of America, to the defendant . . . above named, greeting:

You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the clerk of this court, in the city of Duluth, in said district of Minnesota, fifth division, and file your answer in said clerk's office within twenty days after the service hereof, excluding the day of such service, and if you fail to answer the complaint as aforesaid, the plaintiff will take judgment against you for the sum of twenty-one thousand forty-five dollars and ninety-one cents [($21,05.91)], with interest thereon as allowed by law, and the costs and disbursements of this action.

For the marshal of the United States for the district of Minnesota to execute.

Witness: The honorable Page Morris, judge of the district court of the United States of America for the district of Minnesota, at Duluth, in said district, this 9th day of March, in the year of our Lord one thousand nine hundred and twenty, and of our independence the one hundred and forty-fourth year.

(Seal, U. S. District Court.)

CHARLES L. SPENCER, *Clerk.*
By E. CATHERINE NEFF, *Deputy.*

WASHBURN, BAILEY & MITCHELL,
Plaintiff Attorney.

RETURN ON SERVICE OF WRIT

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I hereby certify and return that I served the annexed summons on the therein-named E. J. Lynch, as collector of internal revenue for the State of Minnesota, by handing to and leaving a true and correct copy with him personally at St. Paul, in said district on the 10th day of March, A. D. 1920.

JOSEPH A. WESSEL,
U. S. Marshal.
By S. J. PICHA, *Deputy.*

[File endorsement omitted.]

13 In United States District Court

Order substituting Margaret C. Lynch as executrix of the last will and testament, etc., in the place of E. J. Lynch, deceased

Filed December 24, 1921

[Title omitted.]

It having been made to appear to the court that the defendant in this case, E. J. Lynch, collector of internal revenue for the district of Minnesota, has died since this case was tried and submitted;

And it further having been made to appear to the court that Margaret C. Lynch is the duly appointed, qualified, and acting executrix of the last will and testament and of the estate of the siad E. J. Lynch;

And it further appearing to the court that Alfred Jaques, Esq., United States attorney for the district of Minnesota, has been duly auhorized by the said Margaret C. Lynch, executrix as aforesaid, to appear for her and consent to her substitution as defendant in this case for the said E. J. Lynch;

Now, on motion of the said Alfred Jaques, Esq., United States attorney for the district of Minnesota, with consent of plaintiff's attorneys,

It is ordered that the said Margaret C. Lynch, as executrix of the last will and testament of the estate of said E. J. Lynch, deceased, be substituted as defendant herein in place of the said E. J. Lynch, and that said case further proceed in the name of said Margaret C. Lynch, executrix as aforesaid, as defendant.

By the court:

PAGE MORRIS, *Judge.*

Dated at Duluth this 24th day of December, 1921.

[File endorsement omitted.]

14 In United States District Court

Answer

Filed August 25, 1920

[Title omitted.]

Now comes the defendant, and for his answer to plaintiff's complaint herein says:

I

That he admits all of the allegations contained in paragraph 1 of said complaint.

II

That he admits all of the allegations contained in paragraph 2 of said complaint.

III

As to paragraph 3, defendant denies that he has any knowledge or information sufficient to form a belief as to whether the allegations herein contained are true or not.

IV

As to paragraph 4, defendant denies all of the allegations therein contained, except that he admits that the fee owners of the property described in said paragraph 4 leased said property to the plaintiff as tenant, by the terms of which lease plaintiff had the right to enter upon said premises and explore the same for minerals, and to open and conduct mining thereon. That by the terms of said lease the rental for said premises was fixed and measured at thirty cents per ton for ore mined therefrom, and that such lease provided that the plaintiff tenant under such lease was to mine from such premises at least 50,000 tons per year, and in case it failed to mine 50,000 tons during any year, it was, as required by said lease, to pay the owner, the landlord, $15,000.00 ground rent for that year.

V

As to paragraph 5 of plaintiff's complaint, defendant denies all of the allegations therein contained, except that it admits that plaintiff sub-leased the property described in paragraph 4 of plaintiff's complaint to Perkins Mining Company as tenant for a period of twenty-five years from September 1, 1908, and that the said Perkins Mining Company as tenant agreed by the terms of said lease to pay as rent for said premises at the rate of seventy-five cents per ton for all ore mined and removed from said premises by the tenant and to mine at least 50,000 tons therefrom during each year of said term. And that if during any year 50,000 tons were not mined from said premises by the tenant, the tenant should pay ground rent for said year of $37,500.00.

VI

As to paragraph 6, defendant denies all of the allegations therein contained, except that he admits that the fee owners of the property described in paragraph 6 of the complaint leased said property to the plaintiff as tenant, by the terms of which lease plaintiff had the right to enter upon said premises and explore the same for minerals and to open and conduct mining thereon. That by the terms of said lease the rental for said premises was fixed and measured at thirty cents per ton for ore mined therefrom, and that such lease provided that the plaintiff tenant under such lease was to mine from said premises at least 25,000 tons per year; and in case it failed to mine 25,000 tons during any year it was, as required by said lease, to pay to the owner, the landlord [$75,000.00], ground rent for that year.

VII

As to paragraph 7, defendant denies all of the allegations therein contained, except that it admits that the plaintiff sub-leased the property described in paragraph 6 of plaintiff's complaint to the Syracuse Mining Company as tenant for a period running for the balance of the term of plaintiff's lease, described in paragraph 6, and that the said Syracuse Mining Company as tenant agreed by the terms of such lease to pay as rent for said premises at the rate of sixty cents per ton for all ore mined and removed from said premises by the tenant and to mine at least 50,000 tons
16 therefrom during each year of said term. And that if during any year 50,000 tons were not mined from said premises by the tenant, the tenant should pay ground rent for said year of $30,000.00.

VIII

As to paragraph 8, defendant denies that he has any knowledge or information sufficient to form a belief as to whether the allegations therein contained are true or not.

IX

As to paragraph 9, plaintiff denies all of the allegations therein contained, except that it admits that the plaintiff was paying rental for the premises described in the complaint as provided in the leases described in the complaint and was receiving rent upon such premises as provided in and by the terms of the sub-leases described in the complaint. And defendant alleges that the ore upon said premises was not sold under the terms of said leases and sub-leases, but that the rental of such premises was fixed and measured by the amount of ore removed therefrom under the terms of such leases.

X

As to paragraph 10, defendant denies all of the allegations therein contained.

XI

As to paragraph 11, defendant denies all of the allegations therein contained, and defendant alleges that mineral lands are invariably leased by the owner (in case he does not desire to operate mines thereon himself) to tenants who are authorized by the terms of such leases to take possession and enter upon such premises and such mineral land and explore for iron ore or other minerals and mine and remove the same and pay a rental usually fixed by the amount of ore so mined and removed.

XII

As to paragraph 12, defendant denies all of the allegations therein contained.

XIII

As to paragraph 13, defendant denies that he has any knowledge or information sufficient to form a belief as to whether the allegations therein contained are true or not.

XIV

As to paragraph 14, defendant admits that for the calendar year 1917 plaintiff in 1918 made out its income-tax report and reported upon the war excess-profits tax, and paid to him as collector on the 10th day of June, 1918, the sum of $10,253.21, of which $5,960.47 was paid as war excess-profits tax, and $4,292.74 was paid as income tax, but defendant denies that said payments, or either of them, were made under demand or pressure of the defendant, or from the Internal Revenue Department, and denies that said payments were made under erroneous or improper relations made by this department, or erroneous or improper demands thereunder by said department; denies that the return was induced by or made under any erroneous demand or regulation or ruling of said Internal Revenue Department; denies that said payments were made because of any fear on the part of the plaintiff that its property would be seized or sold if same were not complied with.

XV

As to paragraph 15, defendant admits that thereafter demand was made upon plaintiff for the payment of an additional war excess-profit tax of $17,128.44, but denies that said demand was wrongful or unlawful.

XVI

As to paragraph 16, defendant admits that the payment of additional excess-profits tax of $17,128.44 was paid by the plaintiff to defendant under protest, but denies that the payment in June, 1908, of the sum of $10,253.21 was made under protest, but alleges affirmatively, on the other hand, that said payment was made voluntarily by plaintiff and without any protest whatsoever.

XVII

As to paragraph 17, defendant admits all of the allegations therein contained except the following allegation contained in the final paragraph thereof, to wit:

"And not desiring to press that point for that year, waives it in the figures hereinafter alleged, which it states shows the correct amount of tax which it should have paid and the amount of refund to which, beyond question, it is entitled"—

and as to this paragraph the defendant denies the allegations therein contained.

XVIII

As to paragraph 18, defendant admits all of the allegations therein contained.

XIX

As to paragraph 19, defendant admits that the total amount of plaintiff's net income for the year 1917 was $77,505.98, but denies that under section 10 of the act of October 3, 1917, or any other provision of said law, or under the facts as alleged in the complaint, eighty or any other per cent was return of capital assets or a part of the value of plaintiff's property as of March 1, 1913; denies that under section 12 of the act of October 3, 1917, that plaintiff was authorized to deduct from its net income eighty or any other per cent thereof as representing the fair market value on March 1, 1913, of the product of the mine sold during the year 1917.

XX

As to paragraph 20, defendant denies that he has any knowledge or information sufficient to form a belief as to whether the allegations contained therein are true or not.

XXI

As to paragraph 21, defendant denies all of the allegations therein contained.

XXII

As to paragraph 22, defendant denies all of the allegations therein contained.

XXIII

As to paragraph 23, defendant admits all of the allegations therein contained.

XXIV

As to paragraph 24, defendant denies all of the legal conclusions and allegations therein contained.

19

XXV

As to paragraph 25, defendant admits the allegations therein contained.

XXVI

Further answering plaintiff's complaint herein, defendant alleges affirmatively that plaintiff corporation was organized under the laws of the State of Minnesota in September, 1907, for the purpose of

buying, working, selling, and dealing in mineral lands and leases upon mineral lands; the exploring for, mining, smelting and reducing, refining and working of ores and minerals; the acquiring of leases upon mineral lands and interests therein, and the sale and disposition of such leases, and the leasing and subleasing of mineral lands and interests therein. On August 25, 1908, plaintiff leased from Henry Stephens and others certain mineral lands in the State of Minnesota known as the Perkins lease, and under date of March 12, 1909, from the same parties, certain mineral lands known as the Hudson lease, which leases are in the possession of the plaintiff, and the defendant asks that the same may be brought into court at the time of the trial of this case for inspection and construction by the court. Said leases each provide in part that "said lands are hereby leased by the lessors to the lessee for the purpose of exploring for, mining out, and removing therefrom the merchantable iron ore (as well as other minerals as hereinafter provided for) which is or may hereafter be found on, in, or under said lands, together with the right to construct all buildings and to make all excavations, openings, ditches, drains, railroads, wagon roads, and all other improvements upon said lands and premises which are or may become necessary or suitable in the mining or removal of the iron ore therefrom and the carrying on of mining operations thereon." Said leases further, respectively, provide "that the lessee, its successors or assigns, shall have the right at any time upon thirty days notice to terminate this agreement and lease insofar as it requires the lessee to mine ore on said lands, or to pay royalty therefor, or to pay tax thereon, by giving written notice in the manner as hereinafter provided to the lessors or their legal representatives or their assigns, who shall in such case acknowledge in writing the receipt of such notice. This lease shall terminate thirty days after the giving of such notice, whether acknowledged or otherwise." Said leases are in the possession of the plaintiff, and defendant asks that the same may be brought into court at the time of the trial of this case for inspection and construction by the court.

On February 1, 1909, the Perkins mine property was sublet to the Perkins Mining Company for operation, and on March 12, 1909, the Hudson lease was sublet to the Syracuse Mining Company upon the respectively royalty bases set out in said subleases, and defendant asks that such subleases may be brought into court at the time of the trial of this action for inspection and construction by the court at such trial.

XXVII

Defendant further states that upon the organization of the plaintiff corporation $25,000.00 of its capital stock was subscribed and fully paid in, and said sum was used for the exploration and discovery of properties hereinabove referred to and for other purposes not now known to this defendant in connection with the objects and purposes for which the plaintiff corporation was organized,

and that said $25,000 capital stock was at all times during the taxing year 1917 outstanding.

In the computation of its war excess profits taxes for the calendar year 1917 the plaintiff computed said tax under section 209 of the act of October 3, 1917, claiming the benefits of that section upon the ground that it had only "a nominal capital" employed in its business. Computing its tax under said section 209, the income and war excess profits taxes for the year 1917 amounted to $10,253.21, which amount was paid by the plaintiff without protest on the tenth day of June, 1918. Thereafter, upon re-examination of its return for the said year 1917, plaintiff was assessed by the Commissioner of Internal Revenue under the provisions of section 210 of the act of 1917 and its tax computed under said section as if said plaintiff had an invested capital for the purposes of computation of the war excess profits tax of $181,011.45, that amount being much higher than the basis provided for under section 201 of the act of October 3, 1917, and the invested capital thus allowed in computation of its taxes under section 210 of the act was much higher than the amount of invested capital which plaintiff claimed should have been allowed it in the computation of its tax, to wit, $124,333.88.

Further answering, defendant states that the income of the plaintiff in the year 1917 was derived solely from rents received by
21 it upon its subleases hereinbefore referred to, and that no part of said income was the result of personal services performed by the corporation or any of its officers, directors, or stockholders.

Wherefore, defendant prays that plaintiff's complaint herein be dismissed and that he recover his costs and disbursements herein and prays for all proper relief.

ALFRED JAQUES, *United States Attorney.*

[File endorsement omitted.]

In United States District Court

Stipulation waiving jury

Filed June 4, 1921

The parties to the above-entitled action do hereby stipulate and agree to waive a jury trial in the above-entitled action and that said case shall be tried before the court without a jury.

WASHBURN, BAILEY & MITCHELL,
Attorneys for Plaintiff.
ALFRED JAQUES, *United States Attorney.*

[File endorsement omitted.]

In United States District Court

Stipulation of facts

Filed June 6, 1922

For the purpose of shortening the trial of this cause the following stipulation is made:

1. That in the year 1907 Marshall H. Alworth and J. L. Washburn, of Duluth, Minnesota, negotiated with Henry Stephens and Albert L. Stephens, of Detroit, Michigan, for an exploratory option contract upon about 5,000 acres of land owned by said Henry Stephens and Albert L. Stephens in St. Louis County, Minnesota, resulting in the execution by said Henry Stephens and wife and Albert L. Stephens and wife to the said Marshall H. Alworth of such contract, the same being dated September 4, 1907, and recorded in the office of the register of deeds of St. Louis, County, Minnesota, September 19, 1907, in Book 4 of Agreements, page 464, said contract, marked "Exhibit A," being made a part of this stipulation.

2. That the Alworth-Stephens Company was organized in 22 September, 1907, its articles of incorporation being duly filed and recorded in said month in the office of the register of deeds of St. Louis County and of the secretary of state of the State of Minnesota and duly published, the said original articles being marked "Exhibit B" and made a part of this stipulation. That the by-laws were duly adopted by said corporation, the same being marked "Exhibit C" and made a part of this stipulation. That the said Alworth, his wife joining, assigned the said option contract, "Exhibit A," to the said Alworth-Stephens Company by agreement in which the said Alworth-Stephens Company assumed all the obligations of said Alworth in said contract; said assignment being dated October 5, 1907, and recorded in the office of the register of deeds of St. Louis County on said day in Book 5 of Agreements, page 180. The said assignment, marked "Exhibit D," is made a part of this stipulation.

3. That the authorized capital as specified in said articles of incorporation was placed at $100,000.00, and the subscription list was executed and presented to the board of directors on the 19th day of September, 1907, for the entire capital stock, and was accepted by the board on said date, the same being as follows:

"We, the undersigned, do hereby subscribe to the capital stock of the Alworth-Stephens Company and agree to take and pay therefor in cash at par, as called for by the board of directors, the number of shares set opposite our respective names, full paid stock

to be issued to each of us from time to time for the amount so called and paid.

"Dated September 19, 1907.

"Henry Stephens, subscribing for 166⅔ shares.

"Albert L. Stephens, subscribing for 166⅔ shares.

"J. L. Washburn, subscribing for 166⅔ shares.

"M. H. Alworth, subscribing for 300 shares.

"W. H. Cole, subscribing for 100 shares.

"W. C. Agnew, subscribing for 100 shares."

That no sales of the capital stock have ever been made by any of the stockholders or transfers thereof except those evidencing gifts to employees or members of families of stockholders or division of the original subscriptions or allotments among associates of original subscribers. That there was called in by the board of directors for payment upon the subscriptions as follows:

23 Call number	Date	Percentage	Amount
1	October, 1907	5%	$5,000
2	December, 1907	5%	5,000
3	January, 1908	5%	5,000
4	March, 1908	5%	5,000
5	June, 1908	5%	5,000
Total			$25,000

and the same was duly paid in upon such calls by the then subscribers to or owners of the stock, and no other or further portion of the authorized capital stock was ever called for or paid in.

4. That the said company with the funds so provided proceeded to explore for iron upon certain of said lands during the year 1908, as shown by statement marked "E" made a part of this stipulation. That no expenditure was ever made by the said company from its own funds for exploration after 1908 except a small item paid on February 4, 1909, as shown in said statement for work done in 1908, and except an item of $1,073.00 expended in 1912 as shown on said statement and hereinafter mentioned.

5. That the exploration conducted in 1908 by the said company upon the SW. ¼ of NW. ¼ and NE. ¼ of SW. ¼ of section 26, township 59, range 15, resulted in the discovery of a body, or rather two bodies, of ore, the principal one being upon the NE. ¼ of SW. ¼, of section 26, and the exploration made on the N. ½ of NE. ¼ of section 11, township 59, range 14, disclosed the existence of a small body of ore, such expenditure amounting to about $18,000. The body of ore upon the NE. ¼ of SW. ¼, of section 26 became known as the Perkins mine, and the ore upon said section 11 became known as the Silverton mine. That pursuant to the provisions of said option contract the said Alworth-Stephens Company applied to the fee owners for a lease upon said lands aggregating 160 acres above described, and there was pursuant to such request executed by the

said Henry Stephens and wife and Albert L. Stephens and wife, the owners of said property, under date of August 25, 1908, a mining lease thereon, the same being recorded in the office of the register of deeds of St. Louis County, Minnesota, on the 28th day of December, 1908, in Book 6 of Agreements, page 297, marked "F" and made a part of this stipulation.

6. That on the first of September, 1908, the said Alworth-Stephens Company made a sub-lease on said 160 acres of land covered
24 by the last named lease to John S. Lutes, the same being dated September 1, 1908, and recorded in Book 10 of Agreements on page 235 in the office of the register of deeds of St. Louis County, Minnesota, the same providing for a royalty of 75 cents per ton, being an increased royalty of 45 cents per ton over and above that provided in the lease held by the said Alworth-Stephens Company last above named, and in addition thereto, there was paid to the said Alworth-Stephens Company as a further consideration for said lease on the 15th day of September, 1908, the sum of $17,868.50, being a return of exploration expenditures on said lands. That the said lease to the said Lutes is marked "Exhibit G" and made a part of this stipulation. That said Lutes assigned said lease to a corporation organized to operate said property known as the Perkins Mining Company which thereafter operated the property until the same was released, which is marked "G1" and made a part hereof.

7. That in July, 1908, the said Alworth-Stephens Company granted an option to H. G. Dalton of Cleveland, Ohio, as trustee, until August 1, 1909, to explore and take out a mining lease or leases upon certain tracts of land covered by the said exploratory contract, Exhibit A, and among others the NW. ¼ of NW. ¼ of section 4, township 58, range 15, in said county and State, which option is marked "Exhibit H" and made a part of this stipulation: said option was thereafter assigned to the Syracuse Mining Company, which said company expended considerable sums in exploration and thereafter surrendered the said lands except the NE. ¼ of NW. ¼ of section 4, township 58, range 15, upon which body of ore had been discovered and upon said last named property a mining lease was called for pursuant to the terms of said option. That thereupon the Alworth-Stephens Company called for a lease upon said property from the fee owners thereof, and the same was duly executed and was dated March 12, 1909, and recorded on the 19th day of April, 1909, in Book 6 of Agreements, page 402, the same being marked "Exhibit I" and made a part of this stipulation, and the said Alworth-Stephens Company thereupon executed to the said Syracuse Mining Company a sub-lease on said property, which was thereafter known as the Hudson mine, the sub-lease being dated March 12, 1909, and recorded April 19, 1909, in Book 6 of Agreements, page 408. The same is marked "Exhibit J" and made a part of this stipulation. That the royalty provided in said lease, Exhibit J, to be paid to the Alworth-Stephens Company was 60 cents per ton, being an increase

of 30 cents over that provided in the lease to the said Alworth-Stephens Company.

8. That the said Alworth-Stephens Company after 1908 did not expend any of its own funds in the said exploration, but made option contracts with other parties for the exploration of said lands with the right to take out mining leases thereon, and executed various option contracts of that character to diverse and saundry people who conducted explorations, all resulting in the discovery of no further bodies or ore except that in the year 1912 a controversy having ensued between the Oliver Iron Mining Company and the owners of what is known as the Stephens mine, being a large body of developed ore situated in township 59, range 15, an adjustment of such controversy was made by a sale of the fee of said property to the said Oliver Iron Mining Company on a basis which provided for a further and more complete exploration of said property to determine the amount of ore therein as a basis of such sale. Such explorations having shown ore near to the north boundary of the SE.¼ of SE.¼ of section 26, township 59, range 15, a tract of land on which said Oliver Iron Mining Company had a dump lease giving them the right to use the surface for dumping purposes, and it desiring to purchase the fee of said tract from the owners thereof, the Alworth-Stephens Company concluded to expend a small amount of money in putting down some holes near the said boundary, and it expended as shown by the said statement "E" the sum of $1,073.00, and disclosed a very small amount mostly of low grade ore in the northeast corner of the said forty acres, but never leased the same for the reason that the same was insufficient in quantity, but in August, 1915, released the same to the fee owners for a consideration of $2,500.00. The blue print of said forty acres, marked "Exhibit K," is made a part of this stipulation.

9. That the Alworth-Stephens Company never owned any other property or conducted any transaction with reference to any other property save and except that covered by Exhibit A, and that it never received any moneys from any sources whatsoever except from royalties under the said Perkins and Hudson leases, the $25,000 paid in by the subscribers to its stock, the $17,868.50 paid for the Perkins lease, and the said $2,500 paid for release of said above named forty acres, and Exhibit E shows the total amount of receipts and disbursements for the entire period of its existance of the said Alworth-Stephens Company. That the only business it conducted outside of the payment of taxes and expenses of explorations shown on Exhibit E was the collection of the said royalties and distribution of same to its shareholders and the fee owners, and that Exhibit L made a part of this stipulation is a table showing the receipts of such royalties, the amounts paid to the fee owners, the amounts paid to the stockholders, and the dates thereof. That Exhibit M, made a part of this stipulation, is a statement showing the taxes paid by the Alworth-Stephens Company and the dates thereof.

10. That on the 20th day of December, 1918, the said Syracuse Mining Company having mined out the body of ore known as the Hudson mine released the said NW.¼ of NW.¼ of section 4, township 58, range 15, the location thereof, to the said Alworth-Stephens Company, which release was recorded in the office of the register of deeds of St. Louis County, Minnesota, December 30, 1918, in Book 22 of Agreements on page 135, the same being marked "Exhibit N" and made a part of this stipulation, and the said Alworth-Stephens Company thereupon and of date of January 31, 1919, released said land to the owners thereof, the release being recorded in the office of the register of deeds of St. Louis County, Minnesota, in Book 23 of Agreements, page 51, copy of which, marked "Exhibit O," is made a part of this stipulation. That in the month of September, 1919, the Perkins Mining Company released all of said lands covered by its lease, the same being dated September 20, 1919, and recorded in the office of the register of deeds of St. Louis County, Minnesota, on the 24th day of September, 1919, in Book 20 of Agreements, page 447, the same marked "Exhibit P," being made a part of this stipulation. That thereupon the Alworth-Stephens Company released the said premises to the fee owners thereof by instrument dated December 26, 1919, and recorded in the office of the register of deeds of St. Louis County, Minnesota, in Book 20 of Agreements, page 503, copy thereof, marked "Exhibit Q," being made a part of this stipulation.

11. That on the 28th day of July, 1915, said Alworth-Stephens Company released to the owners thereof all of the lands covered by Exhibit A except the lands held under lease by the Perkins Mining Company and the Syracuse Mining Company, and the said SE.¼ of SE.¼ of section 26, township 59, range 15, known as the Dump 40, and thereafter and on the 26th day of August, 1915, released the said last named 40 as hereinbefore set forth, copy of the said releases thereof, though not filled out as to the execution, marked "Exhibits R and S," are made a part of this stipulation, the originals having been delivered and recorded in the office of the register of deeds.

That exploration blue prints on certain of said properties
27 in possession of the plaintiff are submitted as part of this stipulation without marking.

WASHBURN, BAILEY & MITCHELL,
Attorneys for Plaintiff.
ALFORD JAQUES, *United States Attorney.*
NEWTON K. FOX,
Special Attorney, Bureau of Internal Revenue.

[File endorsement omitted.]

In United States District Court

Findings of fact and conclusions of law

Filed March 3, 1922

This case having been originally commenced by the plaintiff against E. J. Lynch, as collector of internal revenue for the district of Minnesota, while he was such collector, and he having appeared and answered while he was such collector, and the parties having stipulated in writing, duly filed herein, that the said case should be tried before the court without a jury, and it having come on for trial before the undersigned judge of said court in June, 1921, Washburn, Bailey & Mitchell appearing as attorneys for the plaintiff in said action, Alfred Jaques, Esq., United States district attorney for the district of Minnesota, having appeared as attorney for the defendant, and Newton K. Fox, attorney of the Treasury Department, having appeared as counsel, and a stipulation as to the facts having been made and filed herein and evidence having been taken before the court and briefs having been duly submitted by counsel for the parties, and after the submission of said case said E. J. Lynch having died since the case was tried and submitted, and that Margaret C. Lynch is the duly appointed, qualified and acting executrix of the last will and testament and of the estate of said E. J. Lynch, appointed by the Probate Court of Ramsey County, Minnesota, and said Margaret C. Lynch, as executrix aforesaid, having entered her appearance herein and consented to her substitution as defendant in the said case through Alfred Jaques, Esq., United States attorney for the district of Minnesota, and an order substituting said Margaret C. Lynch, as executrix of the last will and testament and of the estate of said E. J. Lynch, deceased, having been entered herein, as defendant herein in place and instead of said E. J. Lynch as
28 collector of internal revenue for the district of Minnesota, now deceased, and ordering that the said case further proceed in the name of said Margaret C. Lynch, executrix as aforesaid, as defendant, and the court being fully advised in the premises, finds as matters of fact:

ORGANIZATION OF COMPANY AND ONLY ACTIVITIES OF PROPERTY OTHER THAN THE PERKINS AND HUDSON PROPERTIES, WHICH TWO LATTER PROPERTIES ARE HERE DIRECTLY INVOLVED

1. That the Alworth-Stephens Company was incorporated under the laws of Minnesota in 1907, with an authorized capital of $100,000.00, which was subscribed for by five persons who constituted the only stockholders, the subscriptions to be paid in cash at par as called for by the board of directors, and that during 1907 and 1908 five calls of $5,000.00 each were made and paid, making a fully paid in capital of $25,000.00, and no further calls were ever made, and

5,000.00 only of stock was issued, and no more ever has been ued. The certificates for this stock were still outstanding during year 1917.

2. That upon the organization of said company in 1907 Marshall Alworth and wife assigned to said company in exploratory option ntract given him by Henry Stephens and Albert L. Stephens, who re the fee owners, covering about 5,000 acres of land in St. Louis mpany, Minnesota, which contract made by said fee owners to d Alworth was dated September 4, 1907, recorded in the office of register of deeds of St. Louis County, Minnesota, September 19, 07, in Book 4 of Agreements on page 464, and the said assignment m said Alworth and wife to said Alworth Stephens Company was ted October 5, 1907 and recorded in the office of said register of eds on October 5, 1907, in Book 5 of Agreements on page 180. at said option contract from the fee owners gave said Alworth d said plaintiff, as his assignee, the right to explore said lands for nerals, and to call for and take leases upon the basis of a royalty 30 c. per ton, payable to the fee owners for all ore mined and ipped, such leases to run for a period of fifty years from their te and to provide for the mining and removal of a quantity of ore uivalent to 25,000 tons per forty (40) acres annually from the emises described in each such lease, or the payment of a royalty on said minimum annual amount at the rate of 30 c. per ton, yments to be made quarterly.

3. That thereupon the plaintiff, Alworth Stephens Company, with the funds provided by the subscribed stock proceeded to explor' certain of said lands during the year 1908 and never nducted any explorations after said year except that in the year 12 it expended the sum of $1,073.00 in one small exploration and at the total amount that the Alworth Stephens Company ever exnded for exploration was $40,068.00, which included the said ,073.00 expended in the year 1912 and which included the sum of 7,868.50 expended in exploration on the Perkins property as hereafter set forth, and that said amount of $40,068.00 is the entire sum er expended by the company up to and including the year 1917 cept for dividends to stockholders and except for sundry small ems of $1,266.86, and except for the Federal income and profits xes, which were paid the United States Government.

4. That the only amounts which the plaintiff, Alworth Stephens ompany, ever received from any source from its organization to d including the year 1917, outside of royalties received on the erkins and Hudson properties, as hereinafter mentioned, were the id sums of $25,000.00 paid in by the stockholders upon their stock d the sum of $2,500.00 paid to it by the fee owners in 1915 for the lease of one small tract of land upon which the said plaintiff had pended the above-mentioned sum of $1,073.00 in exploration dur- g the year 1912, and the sum of $17,868.50 paid to it as reimburse- ent for its exploration expenses on the Perkins property, as here- after set forth.

5. That after the year 1908 the Alworth Stephens Company distributed to its stockholders as dividends all sums which it received and before the end of the year 1909 had paid to its stockholders as dividends sums in excess of all amounts paid in by them for said stock, and that it did not at that time nor thereafter have any debts or obligations.

6. That in the year 1915 the Alworth Stephens Company released to the fee owners all the lands covered by the option contract above mentioned, and all claims thereon except the lands known as the Perkins and Hudson properties, hereinafter mentioned, and the said company never had any other properties than those covered by the said option contracts from the said fee owners, Henry and Albert L. Stephens. That the said plaintiff, previous to said release, had given certain exploratory options to various parties without the receipt of any consideration, but none of such exploratory options had been exercised by the various optionees, and the said Alworth Stephens Company had conducted no exploration itself except as above stated.

30 7. That during the year 1917, which is the year here involved, the plaintiff, Alworth Stephens Company, therefore owned only two properties, known as the Perkins and Hudson properties, and plaintiff's ownership and relation to said properties as as follows:

Perkins property

8. That during the year 1908 the plaintiff, Alworth Stephens Company, conducted explorations upon the SW. ¼ of the NW. ¼ and the NE. ¼ of the SW. ¼ of section 26, township 59, range 15, and the N. ½ of the NE. ¼ of section 11, township 59, range 14, St. Louis County, Minnesota, and in such explorations expended $17,868.50, upon which property there was discovered by such explorations a body of iron ore, and said property became and was known, as herein referred to, as the Perkins property or mine. That thereupon the plaintiff applied to the fee owners, said Henry and Albert Stephens, for a mining lease upon said property, pursuant to said option contract, which was executed by said fee owners, dated August 25, 1908, and was recorded in the office of said register of deeds on the 28th of December, 1908, in Book 6 of Agreements, on page 297, ran for fifty years, and carried a minimum annual output of fifty thousand tons and a royalty of thirty cents per ton.

9. That under date of September 1, 1908, the plaintiff subleased said premises last above described to John S. Lutes by lease recorded in Book 10 of Agreements, page 235, in the office of said register of deeds, which sublease ran for a period of twenty-five years from its date, and provided for a royalty of 75 c. per ton on iron ore, with a minimum annual output of 50,000 tons per year, or in lieu thereof the payments of an advance royalty on said tonnage, the said royalty of 75 c. per ton being an increase of 45 c. per ton over and above

that which the Alworth Stephens Company was required to pay the fee owners on said property, and as a further consideration for said sublease the said Lutes paid to said plaintiff the sum of $17,868.50, being the return of exploration expenditures made by the plaintiff on said lands. That the said Lutes thereupon assigned said lease to the Perkins Mining Company, which assumed the obligations thereof and operated said property until the ore therein was exhausted in September, 1919. That shortly after said Perkins Mining Company obtained said sublease the exploration of said premises was completed and all the ore proved up, and it proceeded to strip the overburden of dirt and rock from said ore, so as to
31 load the ore therein directly into railroad cars by the steam shovel open pit method, and said stripping was completed as to said property as early as the year 1912, and at that time all the ore therein was developed and the amount in tonnage thereon was definitely known with substantial accuracy, the said stripping development of said mine making same very valuable as it stood in 1912.

Hudson mine

10. That in July, 1908, the said Alworth Stephens Company granted to one H. G. Dalton, of Cleveland, Ohio, as trustee, an option until August 1, 1909, to explore and take out a mining lease upon certain lands, including NW. ¼ of NW. ¼ of section 4, township 58, range 15, St. Louis County, Minnesota, which is a part of the lands which said plaintiff held under its exploratory option contract. That said Dalton thereupon assigned his option to the Syracuse Mining Company, which company expended considerable sums in exploration, and surrendered all of the lands under its option except the said NW. ¼ of NW. ¼ of section 4, township 58, range 15, upon which a body of ore was discovered and the mining lease called for. That thereupon the fee owners of the said property, pursuant to said plaintiff's option contract, executed to the plaintiff a mining lease dated March 12, 1909, recorded April 19, 1909, in Book 6 of Agreements, on page 402, in the office of said register of deeds, which was for fifty years, with a minimum yearly output of twenty-five thousand tons, and thereupon plaintiff executed to said Syracuse Mining Company a sublease on said property, dated March 12, 1909, recorded April 19, 1909, in Book 6 of Agreements, page 408, in the office of said register of deeds, running for forty-nine years, with fifty thousand tons per year minimum, and said property became and was known as the Hudson property or mine. That the royalty provided for in the lease from the fee owners to the plaintiff was 30 c. per ton and the royalty provided for in the sublease from the plaintiff to said Syracuse Mining Company was 60 c. per ton, being an increase of 30 c. over that provided for in the lease from the fee owners to the plaintiff.

11. That upon the taking of said sublease by said Syracuse Mining Company said company proceeded to strip the overburdon from the ore on said property and to complete the exploration thereon, and as early as the year 1912 had completed said stripping and had thoroughly explored said property so that the tonnage of ore
32 therein was definitely known with substantial accuracy, and the same was ready for mining by the open-pit steam-shovel method into railroad cars, which development had rendered said property as it stood in 1912 very valuable.

12. On March 1, 1913, both the Perkins and Hudson properties or mines therefore had been thoroughly explored, the overburdon had been stripped, and the ore therein was ready for mining by steam-shovel operation, and that on said date, considering the tonnage thereof being definitely known and developed, it was known that the ore therein would be completely mined out and exhausted within a period of seven years from that date, and that it would be mined and removed and paid for by the said sublease at least as fast as in equal annual installments during said seven-year period. That the plaintiff from the year 1908 to and including the year 1917 was the owner through said leases of a property interest in said Perkins mine, and from the year 1909 to and including the year 1917 was the owner of a property interest in said Hudson mine. That on March 1, 1913, and ever since said date, to and including the whole of the year 1917, the fair market value of the ore in each of said mines, and the fair market value in the mine of the products thereof, and of each ton therein, was considerably upwards of 75 c. per ton. And that the fair market value on March 1, 1913, of the plaintiff's property interest in the ore in said Perkins mine was not less than 32.355 c. per ton, and of the plaintiff's property interest in the ore in said Hudson mine was not less than 21.57 c. per ton, in each case for each and every ton therein and which was thereafter removed and paid for, the said fair market value of plaintiff's property interest in said ore in said mines on March 1, 1913, being ascertained by multiplying the total number of tons in the Perkins mine by the net royalty of 45 c. per ton, and the total number of tons in the Hudson mine by 30 c. per ton, to be received by the plaintiff and considering the same as payable in equal annual installments for seven years from March 1, 1913, and reducing the total amount so to be received to the present worth as of March 1, 1913, on a 9% discount basis, and then dividing said total March 1, 1913, value by the number of tons therein and so to be mined and paid for, which gives said amount of 32.355 c. per ton for each and every ton in said Perkins mine, and 21.57 c. per ton for each and every one in said Hudson mine. That inasmuch as the life of each of said mines or period within which each was to be exhausted that the ore mined
33 and paid for was not more than seven years from March 1, 1913, and as the ore was to be mined and paid for quarterly in equal annual installments during said period, it follows

that the March 1, 1913, value of each dollar which the plaintiff would receive during the life of said mines for its net property interest was 71.9 c., and that the March 1, 1913, value of the plaintiff's property interests in each of said mines was 71.9% of the total royalties that it would receive, and was 71.9% of the royalty which it would receive on each ton therein when mined, removed, and paid for.

13. That for the year 1917 the reasonable allowance for depletion to which the plaintiff was entitled as to each of said mines was 71.9 c. for each dollar of net royalties which it received for said year and which it had left after paying the fee owners for said royalties due to such fee owners, and for each dollar of such net royalties so received by it it was entitled to deduct as and for the reasonable amount for depletion the sum of 71.9 c. in arriving at its net taxable income for said year 1917. That no allowances made to the plaintiff prior to the year 1917 had equaled the fair market value of the plaintiff's property interest in said mines, or either of them, as of March 1, 1913, and that the said allowances herein provided for during the year 1917 plus any and all allowances theretofore made did not equal the fair market value as of March 1, 1913, of the plaintiff's property interest in said mines, or either of them. That the said allowances for depletion, to be deducted as herein set forth, do no exceed the fair market value in the mine of the product thereof, which was mined and sold and paid for during the year 1917, for which the computation herein set forth is made, which market value of said product so mined, sold, and paid for during said year 1917 was in fact in excess of the full amount of all royalties received by the plaintiff from its said lessee, including those which the plaintiff was required to pay to said fee owners.

14. That the total amount of the net royalties which the plaintiff received from said properties for the year 1917 and which were left and belonged to it after it had paid therefrom all royalties due from it to the fee owners was $77,505.98, and that it had no receipt during said year from any other source whatsoever. That its invested capital for and during said year 1917 was not to exceed $25,000.00, represented by its certificates of capital stock outstanding, it being true that during the year 1917 said company did not employ any capital in any operations in its business or to produce its income for said
34 year, and it also being true that prior to 1917 the company had paid out to its stockholders several times the amount which originally had been put into said company for said stock, and it being true that if the original $25,000.00 so paid in be considered as being returned to its stockholders ratably per ton as the ore was mined and paid for, according to the total tonnage in the properties, there was left on the 1st day of January, 1917, only about $4,500.00 still unreturned, and if it be considered that its invested capital was the total sum of $40,068.00 expended for exploration plus the sum of $1,266.86 expended for other small items as set forth in paragraph 3 hereof, which were the only sums it ever spent, and that

said sum was returned ratably per ton as the ore was mined and paid for, in proportion to the total tonnage, then said company on January 1, 1917, had only about $7,500.00 remaining still undisturbed. That from said total net receipts of $77,505.98 for said year 1917 the said plaintiff was entitled to the said reasonable allowance of 71.9% of said receipts as depletion, amounting to $55,726.80, leaving its net taxable income for said year the sum of $21,779.18. That the income tax on said amount for said year at the rates specified in the law was $735.70, and the war and excess profits tax on which was $9,517.51, or a total income and excess and war profits tax of $10,253.21. That the computation of said tax is as set forth in Exhibit A hereto attached.

15. That for said year 1917 the plaintiff paid to E. J. Lynch, collector of internal revenue for the district of Minnesota, within the time required by law as and for internal revenue taxes for that year, $10,253.21, which was the full amount due from plaintiff for taxes for said year, and which said sum was paid on the 10th day of June, 1918. That thereafter the said E. J. Lynch, collector, and the Department of Internal Revenue, made additional demands upon this plaintiff for the payment of additional amounts, and demanded of this plaintiff that it pay an additional tax amounting to $17,128.44, which, pursuant to said wrongful demand, this plaintiff did pay to said E. J. Lynch on the 21st day of February, 1919, making a total paid by this plaintiff for the income and war and excess profits taxes for the calendar year 1917 of $27,381.65. That at the time of making said payment of $17,128.44 this plaintiff protested to said E. J. Lynch and the said Internal Revenue Department against the exaction of said tax and paid the same under protest, and in April, 1919, filed its appeal with the Commissioner of Internal Revenue for claim for refund of the taxes erroneously exacted from this plaintiff, and the said claim for refund and
35 appeal was disallowed and objected to by the said E. J. Lynch and the Internal Revenue Department, and this suit was commenced within the time required by law. That said plaintiff was required to and did pay $17,128.44 internal revenue taxes for the year 1917 in excess of the amount which it was required by law to pay, which payment, as aforesaid, was made on the 21st of February, 1919.

16. That all the ore in the Perkins property having been previously mined out, the said Perkins Mining Company, on the 20th of September, 1919, released to the plaintiff herein all of the lands covered by its sub-lease, which release was recorded September 24, 1919, in Book 20 of Agreements, page 447, in the office of said register of deeds, and that thereupon the plaintiff herein released said premises to the fee owners thereof by instrument dated December 26, 1919, duly recorded in Book 20 of Agreements on page 503, in the office of said register of deeds.

17. That on the 20th day of December, 1918, all of the ore in the said Hudson property or mine having been mined out, the said Syracuse Mining Company released the said lands to the plaintiff herein,

which release was recorded December 30, 1918, in Book 22 of Agreements on page 135. That thereupon the plaintiff herein on January 1, 1919, released said property known as the Hudson mine to the fee owners, which release was recorded on that date in Book 23 of Agreements on page 51 in the office of said register of deeds.

18. That all of the ore in both of said properties was mined out and paid for within seven years from March 1, 1913. That the foregoing constitutes the actual transactions of the plaintiff pertaining to its 1917 tax obligations, and the correct basis upon which the court finds that its tax for said year should be figured. The value of plaintiff's March 1, 1913, property is being reckoned on a 9% discount basis to the end that the principles and computation may be simplified, instead of using the 10% basis on the Perkins mine and the 8% on the Hudson mine, which might be permissible under the evidence, the result in either case being practically the same. It is deemed unnecessary and tending to confuse rather than clarify the issues to set forth in detail the contentions or claims which were from time to time made by both the Government and the plaintiff.

As conclusions of law it is found: That the plaintiff is entitled to have and recover of and from the defendant the sum of seventeen thousand one hundred twenty-eight and 44/100 dollars ($17,128.44), with interest thereon from the 21st day of February, 1919, at the rate of one-half of one per cent per month, together with the costs and disbursements of this action.

Let judg'ent be rendered and entered accordingly.

Dated March 30th, 1922.

By the court:

PAGE MORRIS, *Judge.*

Stay of execution of forty-two days after entry of judgment granted, to enable the defendant to sue out writ of error or take such other action as she may be advised.

PAGE MORRIS, *Judge.*

EXHIBIT A TO FINDINGS

Alworth-Stephens Company—Computation of tax for year 1917

Net receipts from Perkins lease	$40,896.99
Net receipts from Hudson lease	36,608.99
Total net receipts	$77,505.98
Deduct:	
71-9/10% of said receipts as depletion or return of capital assets as established March 1, 1913	55,726.80
Balance income for 1917	$21,779.18
Excess profits calculation:	
15% of invested capital $25,000 is	3,750.00
5% " " " (15–20%) "	1,250.00
5% " " " (20–25%) "	1,250.00
8% " " " (25–33%) "	2,000.00
Balance above 33%	13,529.18
Total income, 1917	$21,779.18

From total of 1st and 2nd items of taxable profits or		$5,000.00
Deduct 7% of capital	$1,750.00	
Specific deduction	3,000.00	
		4,750.00
Balance taxable at 25%		$250.00
$250.00 taxable at 25%		$62.50
$1,250.00 " " 35%		437.50
$2,000.00 " " 45%		900.00
13,529.18 " " 60%		8,117.51
Total excess profits tax		$9,517.51
Total income as shown above		$21,779.18
Less excess profits tax		9,517.51
Balance taxable at 6%		$12,261.67
6% of $12,261.67		$735.70
Plus excess profits tax		9,517.51
Total tax payable		$10,253.21
Amount assessed and paid		$27,381.65
Amount that should have been assessed		10,253.21
Amount overpaid		$17,128.44

In United States District Court

Memorandum opinion

Filed March 30, 1922

In this case after careful consideration of the briefs I am of the opinion that under the terms of the law in force in 1917, which permitted only net income to be taxed, the plaintiff was entitled, in figuring its net income and excess profits tax, to a depletion to the extent of the market value in the mine of the product thereof mined and paid for during the year, but that depletion should be figured on a risk rate basis of 10% on the Perkins mine and 8% on the Hudson mine, or an average of 9%, instead of on a 6% basis as contended for by plaintiff, the life of each mine being seven years.

I do not think there can be any question but that on the 1st of March, 1913, the plaintiff owned a valuable property interest or right in both of these mines, and that the value of that property interest or right was approximately capable of definite ascertainment and should be determined on the basis above indicated. The plaintiff on the 1st of March, 1913, owned this property interest or right and has ever since owned it. It could have sold it on that day for an amount calculated on the above indicated basis,

38 and surely until the part of that amount represented by the ore taken out is deducted there could be no net income or profit on such ore taken out. This allowance or deduction for depletion would not be a deduction for depletion as against the owner. Under the evidence in this case both the fee owner and the plaintiff would be entitled to such deduction, and both could get such deduc-

tion in full as to the ore taken out without exceeding the market value of such ore in the mines as of the 1st of March, 1913

I am also of the opinion that the invested capital of the company was in 1917 $25,000, and that that invested capital could not be said to be not more than a nominal capital, and that therefore the levy and assessment could not be made under either sections 209 or 210 of the act, but must be made under section 201.

In short, I am of the opinion that the levy and assessment should have been made by first allowing depletion upon the basis above indicated and then determining the amount to be paid by considering the plaintiff as a corporation having an invested capital of $25,000.

MORRIS, *Judge.*

[File endorsement omitted.]

In United States District Court

Judgment

Filed March 30, 1922

[Title omitted.]

Pursuant to the findings of fact, conclusions of law, and
39 order for judgment this day filed in the above entitled action it is hereby

Ordered, adjudged, and decreed that the plaintiff, Alworth-Stephens Company, do have and recover of and from the defendant, Margaret C. Lynch, executrix of the last will and testament of the estate of E. J. Lynch, deceased, substituted as defendant in the place of E. J. Lynch as collector of internal revenue for the district of Minnesota, deceased, the sum of seventeen thousand one hundred twenty-eight and 44/100 dollars ($17,128.44) with interest thereon from February 21, 1919, at the rate of one-half of one per cent per month amounting to three thousand one hundred ninety-four and 45/100 dollars ($3,194.45), amounting in all to the total sum of twenty thousand three hundred twenty-two and 89/100 dollars ($20,322.89), together with the costs and disbursements hereafter to be taxed.

JOEL M. DICKEY, *Clerk.*
By E. CATHERINE NEFF, *Deputy.*

A true record.
Attest:

In United States District Court

Bill of exceptions

Filed September 13, 1922

[File endorsement omitted.]

The above-entitled matter came regularly on for hearing in the Federal Building, city of Duluth, State and district of Minnesota,

on the 6th day of June, 1921, before the honorable Page Morris, judge; Messrs. Washburn, Bailey & Mitchell appearing as attorneys on behalf of the plaintiff, and Alfred Jaques, United States attorney, and Newton K. Fox, attorney, Treasury Department, appearing as attorneys on behalf of the Government.

Whereupon the following proceedings were had, to-wit:

(Stipulation of facts marked for the purpose of identification as plaintiff's Exhibit 1.)

Mr. BAILEY. We will offer in evidence plaintiff's Exhibit 1, being a stipulation between the parties, which I will ask the clerk to file.

Now, may it be understood, Mr. Jaques, that the exhibits referred to in this stipulation may be withdrawn, that is, the originals, and copies substituted, if the plaintiff desires?

Mr. JAQUES. Yes.

J. L. WASHBURN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. BAILEY:

Q. Mr. Washburn, you are, and ever since its organization have been, president of the Alworth-Stephens Company, the plaintiff in this case?

A. No, sir. I think I have been president since some time in 1915. Mr. Alworth was president at first.

Q. Well, you have been an officer of the company ever since its organization?

A. Yes, sir.

Q. The president since 1915?

A. Yes.

Q. Are now?

A. Yes.

Q. Were there any salaries paid to the officers or managers of that corporation?

A. None.

Q. These two mines, the Perkins and Hudson, which are involved in this suit and referred to in the stipulation which has been introduced, do you know whether they were both stripped prior to March 1, 1913?

A. Yes, sir; I think so. There is 1 forty so-called that was never stripped or never mined, but the forty containing what we call the Perkins mine was stripped.

Q. Was stripped practically at that time of all ore that has ever been mined up to date in either of the properties?

A. That is my understanding.

Q. As of the 1st of March, 1913, will you state within what time it was considered by the officers of the Alworth-Stephens Company that the mining would be completed?

Mr. Fox. I object to that question because it seems to me that all of this matter is immaterial and irrelevant: that date has no bearing upon the issues in this case under the court decisions.

The COURT. I will take the testimony; and if I find that it is not material, why, of course, I will not consider it. I will take the testimony so we will know what they want to testify to; and if it is considered immaterial, the court will strike it out.

Mr. FOX. We want to have an exception to it.

41 A. Well——

Mr. JAQUES. We would like to have the same objection and exception.

Mr. FOX. On the March 1, 1913, value.

The COURT. You can object to all the testimony in reference to the value of the property as of March 1, 1913.

Mr. JAQUES. Or amount of ore in the property.

The COURT. Or the amount of ore.

Mr. JAQUES. As to whether it was stripped and all the conditions.

The COURT. Very well.

Mr. FOX. All matters relating to the stripping of ore, or the value of the ore, or the amount of the ore are immaterial.

The COURT. Let it be understood that the court for the time being overrules your objection and allows the testimony to come in, and if I find that that is immaterial it will simply be disregarded. Proceed.

Q. On these two properties?

A. Well, my recollection is that it was within seven years and probably a somewhat shorter limit.

Q. Well, so far as any figuring by the Government is concerned, or claim for refund, upon what basis has the claim been made as to the time from March 1, 1913?

A. Seven years.

Q. In fact, the mining was completed and the leases all surrendered before seven years was up. Is that not true?

A. Why, I think so. The mining was done and the stipulation will show the exact dates of the surrendering of the leases.

Mr. JAQUES. 1919.

The COURT. The stipulation will show when it was surrendered.

The WITNESS. Yes; Your Honor.

The COURT. And the mining was completed before that?

The WITNESS. Yes.

Q. In the claim of the company, was it considered that the mining would be done in a substantial annual instalment during that seven years from March 1, 1913?

42 A. That was my understanding—on the basis we made those figures upon; I participated in the making; I didn't make them myself.

The COURT. Made up on the basis that from the 1st of March, 1913, there would be an equal amount of ore mined each year until the mine was exhausted?

The WITNESS. Seven years.

The COURT. And that would take seven years?

The WITNESS. Yes.

Q. As a fact, it was mined and paid for faster than that basis, was it not?

A. It was.

Q. From January 1, 1917, did the company have any money whatsoever, except the royalties that came in from time to time?

A. Nor for a long time before that.

Q. After that time and for a long time before that had the company paid out to its stockholders almost simultaneously practically the full amount of money that was received from royalties from time to time?

A. We had to keep a little for some of the taxes. The statement shows the amount we received, when we got it, and how we paid them out, that statement that is in the stipulation.

Q. Such amounts as were kept on hand, were they kept for any other purpose than for the payment of taxes, except perhaps to make even the amount the payment made to the stockholders?

A. That is all; the statement will show on that as to the fee-owners, the payment to the fee owners was exactly to the cent—that was so much per ton, but the distribution to the stockholders kept evened up in even money, sometimes over and sometimes under; generally ran to keep it about even.

Q. Did the Alworth-Stephens Company ever have any other properties than the properties referred to in this stipulation, plaintiff's Exhibit 1?

A. No.

Q. And it has no property now except a few dollars?

A. There is a few dollars left in the treasury; other than that we have nothing.

Q. The affairs of the company are all wound up with the exception of this claim of the Government?

A. Yes, sir.

Q. The company has no prospective business?

A. We intend to wind it up just as soon as we settle this lawsuit, but I hope we will wind it up by a distribution of some of the money that has been taken away.

43 Mr. BAILEY. I will call on Mr. Jaques and Mr. Fox for the original tax returns that were filed by us with the Government for the year 1917.

Mr. FOX. I have certified copies; they don't allow the originals to go out.

Mr. BAILEY. If it is agreeable to you it is agreeable to us.

Mr. FOX. I will give you the original to work with, because it is easier to look at.

Mr. BAILEY. Well, I don't intend to look at it.

Mr. FOX. They are the certified copies.

Mr. BAILEY. Well, I have got all that stuff that we want to put in together here and in order. Do you want to produce the originals that you have or certified copies to put in in place of the carbon copies I have?

Mr. Fox. Everything that you want I think we have for you.

Mr. Bailey. Do you want to substitute your photographic copies for our carbon copies?

Mr. Fox. Put in the certified copies.

(Income-tax return marked for the purpose of identification as "Plaintiff's Exhibit 2.")

Mr. Bailey. Will it be understood that these letters, this chain of correspondence that I now may offer and by the reporter marked and the actual numbers of the exhibits put on later?

Mr. Fox. Perfectly agreeable to us.

Mr. Bailey. Then I offer this chain of correspondence between the department and the Alworth-Stephens Company, and its attorneys, marked exhibits blank to blank. I also offer the certified copy of the income and excess-profits return of the Alworth-Stephens Company, which has been marked "Plaintiff's Exhibit 2"; also the claim for refund, a certified copy of that. I offer both the claim for refund and the return of the company.

Q. Just state for what reason, Mr. Washburn, if you will, the company paid or made the return and paid on the basis which it did for the year 1917: that is, its first return.

Mr. Fox. That is objected to as incompetent, irrelevant, and immaterial; the writing will show what.

44 Q. What pressure was brought to bear upon the payment by the Government?

A. Which payment do you mean?

Q. The first one for 1917, $10,250?

Mr. Fox. That is objected to.

A. Well, we made our return——

Q. Well, did you do it—what I am getting at, did you do it because of the request and demand which the Government was making with reference to the law?

Mr. Jaques. That is objected to as incompetent, irrelevant, and immaterial; it is made according to a request, and everybody paid their taxes and did it according to a request.

Mr. Bailey. That is exactly what we claim isn't right.

The Court. We may consider the payment under protest. Go ahead; that will be a question to answer.

A. I don't know as I understand the question entirely.

Mr. Bailey. I will withdraw it, then.

The Witness. We made our payment.

The Court. You made your return paid up?

The Witness. We made our return and we made it *and we made it* for what we thought the Government by any kind of law could possibly ask for. They came back for seventeen thousand more.

Q. Why didn't you claim depletion at that time?

A. I didn't understand that phase of the question. I understood that we took the position that the Government did; that we weren't allowed depletion where there was a lessee subleasing property; we took the other basis, thinking we could allow everything that was

possible on the other basis. We gave the Government the benefit of the doubt and didn't care to have any fuss about it.

Q. The rulings were made by the department that the depletion would not be allowed to a lessee?

A. That is the way I understood.

Q. I think it was allowed to the lessor?

A. Yes, sir.

Q. It was for that reason no depletion was claimed at that time?

A. Yes, sir; we took the highest basis right in their basis and put it under that basis. Mr. O'Donnell, accountant for the company, and I worked on it for some time.

Q. Has the company ever taken the benefit of any depletion prior to the year 1917?

A. No, sir.

45 Q. Now, I presume what you have got in in these returns, and so forth, shows that the payments were made, as stated in the complaint, to the Government. There is no doubt about that?

Mr. JAQUES. That is admitted in the pleadings.

Q. At any rate the company has paid as income tax profits for the year 1917 something over $27,000, the exact figures which are stated in the complaint?

A. We paid the second payment of $17,000, accompanied by a written protest—the receipt must be there somewhere—paid it within the time fixed by the levy—I don't remember what it was—probably ten days—I don't think it was less than 24 hours—they must have given us that much.

Mr. BAILEY. That is all I have now, unless you want to call my attention to some question that I haven't asked.

The WITNESS. Well, there may be something about the estimates, but leave that for the present.

Cross-examination by Mr. Fox:

Q. Did you assist in the preparation of the income-tax return of the plaintiff for the year 1917?

A. Yes; I did to some extent.

Q. To what extent?

A. Well, Mr. O'Donnell made out those returns; he was consulting with me all the while while he was doing it—back and forth.

Q. Under that return no claim was made for a depletion to the lessee, was it?

A. I don't think so.

Q. Was there anything in that return relating to a March 1, 1913, value, in computing the amount of taxes due under that return?

A. The return will show for itself, but I don't recall of anything.

Q. Were you familiar with the payment of the initial tax of some ten thousand dollars odd?

A. That is what I am talking about; that is what I understood your inquiry to relate to.

Q. Was there any formal protest made upon the payment of the taxes?

A. On that $10,000?
Q. The ten thousand.
A. Why, I don't think so.
Q. Was there any written letter or memorandum accompanying
e return which would indicate a protest against the payment of
the initial $10,000 tax?
A. I don't recall it; if there was, you must have it, but I
don't recall it; there might be such a thing and I not know
, but I don't think so.
Q. You testified regarding the return to the stockholders of the
laintiff company of their original capital invested—was that not
turned by way of dividends?
A. Well, we have a habit of referring to everything as dividends;
e have in these, and I guess the whole books of account are on the
asis of what we call dividends. You can call it so if you wish;
here were distributions to the shareholders of the moneys that we
ceived.
Q. Distribution of what moneys?
A. Moneys we received from royalties on the subleases on this
roperty. The exhibit you are hunting for—I can answer you—re-
ived money in all its life from four things: first, $25,000 subscribed
y these parties to its capital stock; it next received about $17,868.50,
eturned to it as a consideration for the sale of the Perkins—it
as exploration money expended on it; it got then most of its
oney from the royalties coming in on the leases and it got $2,500
rom the fee owners for the release of forty acres; that is all the
oney the company ever had; that is the whole story.
Q. Exhibit L, which you have referred to, shows that from the
ear 1909, up to and including October, 1919, that the stockholders
this company had received $635,250. That was received from
oyalties, was it not?
A. Exhibit L shows right where it came from. I have it.
Q. The capital stock was paid in in five calls, which calls were made
s it became necessary to pay for the expenses of the exploration?
A. Yes, sir. That was in 1908; 1908 this company did all the
xploration work it ever did, with the exception of that one piece
1912, that one item.

Redirect examination by Mr. BAILEY:

Q. Did you use any of the company's money in exploring after
908?
A. Not except that in 1908, when we put down those four or five
oles in the forty next to the Stephens mine, $1,037, or something
ke that.
The COURT. There may be a lot of this going in here that I will
ntirely disregard when the proper times comes, but I will let every-
thing go in.
Mr. FOX. I appreciate that.
(Witness excused.)
(Recess.)

WILLIAM A. ROSE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. BAILEY:

Q. Mr. Rose, what is your business?
A. Mining engineer.
Q. With the Pickands-Mather & Company?
A. Yes, sir.
Q. Have been for how long?
A. For nearly eight years.
Q. You are the chief engineer for them, are you?
A. Yes, sir.
Q. Were you with them in 1913 and for some time prior thereto?
A. Yes, sir; I went with them in 1913.
Q. Is the Syracuse Mining Company one of their companies?
A. One of the companies which they have operated.
Q. Is that the company which held the lease from the Alworth-Stephens Company upon the Hudson mine?
A. Yes, sir.
Mr. JAQUES. Of course, we have an objection and exception to all this.
The COURT. Yes; but, of course, he is just qualifying the witness.
Q. You, of course, kept during the progress of the mining the records of the ore that was mined and of the tonnage in the mine, did you?
A. Yes, sir; we did.
Q. Was that mine all stripped: that is, all the ore stripped prior to March 1, 1913?
A. Yes, sir.
Q. The ore was all uncovered?
A. Yes, sir.
Q. Within what time was it estimated that the ore would be mined out?
Mr. Fox. We would like to have the same objection to the introduction of any testimony as of March 1, 1913, of the amount of ore, the quantity, as in the testimony of Mr. Washburn.
The COURT. Overruled and exception. Proceed.
Q. (Last question read by the reporter.)
A. It was reasonable to estimate at that time that the ore would all be mined out within six years.
48 Q. Seven equal annual installments during that——
A. Yes, sir.
Q. When was it mined out?
A. In 1918.
Q. It was entirely in 1918?
A. Yes, sir.
The COURT. That is the Hudson mine?
The WITNESS. Yes.
Q. What was the present cash value of that ore on March 1, 1913, as near as can be stated?

Mr. Fox. In the ground?

Mr. Bailey. Yes.

A. The estimate of the cash value of the fee as of March 1, 1913, it would be at least one dollar.

Q. Without regard to any lease or sub-lease?

A. Without any encumbrance.

Q. You considered it would be worth a dollar a ton?

A. Yes, sir.

Q. Your company was paying a royalty at sixty cents per ton, was it not?

A. Yes, sir; it was.

Q. Will you state to the court what the fact is as to how it worked out—state how much over, if anything, that goes, per ton, you realized?

A. I think I can do that. We actually made out of the property approximately one forty-five operating profit per ton.

The Court. The number of tons?

The Witness. Number of tons, I think, 830,000 tons actually shipped—shipped subsequent to March 1, 1913. I would like to go ahead with that—having made an estimate of the approximate value of the property as of March 1, 1913—for the purpose of that estimate I assumed that there were 800,000 tons of ore in the property as of that date; as a matter of fact, there were shipped, as just stated, 833,000 tons, approximately, from the property subsequent to March 1, 1913. At that time all the stripping was completed, and there was a net amortization balance of about a hundred thousand to be charged against the remaining ore.

Q. That is, they stripped it prior to that time and had been charged off the stripping against that ore to that extent?

A. That $100,000, together with such additional equipment as was necessary, would make a total charge against the remaining ore of approximately eighteen cents per ton. Now, we estimated the
49 actual mining cost of that ore per ton subsequent to March 1, 1913, to average thirty cents per ton. We estimated the taxes to be five cents per ton; and if we were to average the rail rate for the six-year period previous to March 1st just to get an average for the subsequent period, or the life of the property, we would get an average freight rate of seventy-seven cents for rail and sixty-four cents for lake, to which if we were to add a reasonable commission and insurance a loss of fifteen cents, which would make a total cost—expected cost of the ore in the ground March 1, 1913, approximately $2.09.

Mr. Washburn. Did that include the royalty?

The Witness. No; that is the fee not including the royalty. Now, the average analysis of the remaining 800,000 tons of ore——

The Court. I do not see any necessity of our going into that, unless the other side wishes it.

Mr. Fox. It will be important.

The Court. Very well; go on, then.

A. The average analysis of this 800,000 tons is approximately fifty-eight per cent dried iron and thirteen per cent moisture, or *natural iron contents* of 50.46 per cent, which would have an average value on the basis of the Lake Erie prices for the preceding six years of approximately $3.48, or a profit per ton to be made from the ore as mined of $1.39 for the fee. If you were to allow the purchaser six per cent interest, the present value of that profit, or, in other words, the value of the ore in the ground, as of March 1, 1913, would amount to $1.14 per ton.

Q. So that this $1.45 that you stated would be regardless of any lease?

A. Yes.

Q. That is what could be realized by the fee owner if he had operated it himself?

A. Yes, sir.

Q. You said there were actually 832,675 tons there?

A. Yes, sir; but in making up this estimate I assumed only 800,000 tonnage; the profits were a little more than that.

Q. So that, as estimated March 1st, it was at least 800,000 tons?

A. Yes, sir.

Q. So the ore remaining there in 1917—January 1, 1917—and throughout that year was worth then at least these figures that you have given?

A. I think it was worth more, because the price of ore was higher and the margin of profit was greater.

50 The COURT. The question is, was that at least that?

The WITNESS. Yes, sir.

Cross-examination by Mr. Fox:

Q. You have testified as to the value of the ore in the Hudson mine as of March 1, 1913. Upon what basis is your valuation made?

A. I think that I gave all the details of the basis on that valuation.

Q. Will you state for the benefit of the court the elements which go into a value of a mine?

A. Yes, sir. The value of the property would be made up of several factors, first of which probably would be the total reserve in the property, and, second, would probably be the ease with which that ore could be mined, which would be reflected in the total cost of getting the ore on cars—probably in the Hudson mine it would be stripped, of course—would be mined at a very reasonable cost. Does that answer your question?

Q. Are there any other factors that you would take into consideration in placing the value?

A. We would take into consideration in the average expected Lake Erie value of the ore in the ground per ton, on the basis of some adequate record all values, as I did in this case, in using the dates of an average period of the Lake Erie values.

The COURT. You mean the value of the ore delivered at Lake Erie?

The WITNESS. Yes, sir. My answer to that is true; but to get the value of the ore in the ground you would deduct the rail and lake freight, as all these other items which I have read in the testimony, as being part of the estimate of the cost.

Q. Does the average expected price for the last six years form the usual basis for valuation?

A. It would in the case of the Hudson mine, with the expected life of six years.

Q. Is a longer period used?

A. Not in the case the property was of short life.

Q. The grading of the ore has something to do with its value?

A. Yes, sir.

Q. You have taken that into consideration?

A. I have taken that into account.

51 Q. And the market price also?

A. Yes, sir.

Q. Your value states the value of the fee, does it not?

A. Yes, sir.

Q. Isn't there a difference between the value to a fee owner and the value to a lessee?

A. The difference represented by the royalty account.

The COURT. The lessee has to pay the fee owner. The value to the lessee would be just that much less, by the amount of the royalty that he would have to pay to the fee owner, wouldn't it? That is the common sense of it.

The WITNESS. That is what I stated in my answer.

Mr. WASHBURN. That is what he said.

Q. Does that take care of the provision for the risks?

A. I would say it is practically in this case, because the property was leased for that amount to an operating company.

Q. Did your estimate take into consideration the fluctuations which might occur through a poor market?

A. I took a fixed period—I think we should apply that in this case.

Q. Use a due allowance in case of a low market?

A. Yes, sir.

Q. And that is the same as to the fee owner as to the lessee?

A. I don't see why it shouldn't; I don't think any properties are being sold on the market conditions in any low year, or any high year.

Q. Isn't the risk rate on a short life property inherently greater than on one which would continue over a long period of years?

A. I don't see why it should be.

Q. Well, there might be a fall in the market—there might be a strike—there might be some general condition which would defer a return in your short life, whereas on the long life property, those factors are more or less even, isn't that true?

A. I think they would be represented the same number of times in the long life as you would expect to be represented in the short life property, in proportion to the length——

Q. How about having two years strike?

A. Take the same average for the small property as you would the large.

Q. You value it the same?

A. Yes.

Q. With no difference?

A. No difference.

52 Q. No allowance made?

A. Provided you take adequate account of the market conditions and I did that.

Q. Are you basing it principally on market conditions?

A. Basing what?

Q. Your value.

A. No; on the market conditions and on the ability of the mine to produce ore at the rate indicated; so far as I know, in the history of the Missabe Range we have only had one brief period when we couldn't ship ore on account of strikes.

Q. How about the panic which actually occurred during the period of this lease—did you take that into consideration?

A. In 1914—as a matter of fact, the property did better than we already estimated it.

Q. The panic would affect the value, though?

A. In 1914—the property shipped practically the average shipment in 1914 that it did for the life of the property.

Q. What was the grade of the ore in the Hudson mine? What classification did you give it?

A. Mesaba non-Bessemer.

Q. Are you familiar with the value of the non-Bessemer ore during the years 1895 to 1898?

A. Not so long ago as that—you mean nineteen?

Q. Nor in the nineties?

A. No; I am not familiar with them.

Q. Is there any standard authority on mined valuation which would take a six year period in order to determine values? Can you refer to any?

A. I know of no standard authority on Lake Superior iron ores; if there is such a rule, I don't know it; if there is any standard authority, I would say such authority would be in the first case useless; there is no occasion to get anyone to write such a work.

Q. What per cent rate do you use in determining the value of this Hudson mine?

A. I used six per cent; I think I quoted that in my testimony.

Q. Under what formula did you apply that?

A. Which formula?

Q. Yes.

A. One dollar for the given length of the property—in this case six years.

Q. There are a number of such formulas for determining values, are there not?

53 A. Why, there are several written formulas.

Q. I mean recognized authorities.

A. Not that I know of.

Q. Is this your own estimate and not based upon any of the *of the* authorities of the mined valuation?

A. Yes, sir.

Q. You used no authority, then, or formula of any authority on mined valuation in making your calculation?

A. Let me get your question. Do you mean for the entire calculation or for figuring present value on the six per cent basis?

Q. For determining your present value factor.

A. That is different; for determining present value factor I used the authority. You asked me several—I said I didn't know——

Q. I mean several different formulas for computing.

A. In tables, you understand, they give you a single factor—in this case, for instance, six years on a six per cent basis, which you can apply to your profit—expected profits per ton for the ore in the ground, to reduce it to the value at the beginning of the year.

Q. What tables are these, your own tables, or——

A. No, sir. One work is Hoskold's tables.

Q. Did you use his tables in your computation of the value?

A. I have another book in the office.

Q. That is not responsive to the question. Did you use Hoskold's tables?

A. I have one book in the office also, published by Mr. Hurd, which gives a six per cent table; I don't know which one I used, but I think I used Hurd's tables.

Q. What does Hurd's table provide for in the case of ore such as was found in the Hudson mine?

A. It doesn't apply to ore specifically at all.

Q. Does he use the six per cent basis?

A. He doesn't make any calculation for the value of ore.

Q. Did he make a recommendation?

A. None that I know of.

Q. Have you read Hurd?

A. I don't think so. You understand these tables which I am quoting have nothing to do with the value of ore, and as far as I know there is a number of people that do publish tables.

Q. I understood you to use them in determin'g the value, the present value of ore in this Hudson mine?

A. I used it merely to reduce the expected profits back to present value.

Q. That determines the value, does it not?

54 A. Not in the first instance.

Mr. Bailey. Used it just like an interest table?

The WITNESS. Just like an interest table or any other table—like a multiplication table.

Q. It determines its present worth?

A. Yes.

Q. Isn't that the important thing, the present?

A. I would certainly say it wasn't.

Q. What is the important thing?

A. The important thing is to find out how much operating profit per ton you are going to make on the ore during the life of the property.

Q. Well, how do you get the value on the day on which you start to operate until you have determined that? The present worth is what you are trying to get, isn't it?

A. Yes.

Q. You use these tables in order to determine the present worth?

A. Just like an interest table or any other kind of a table. It has nothing to do with the question of iron ore mined any more than a multiplication table has, although it is used for the same purpose.

Q. It is based upon some principle—you should use some principle in order to arrive at the value, should you not?

A. What value?

Q. The present value.

A. Yes, sir.

The COURT. If you get $5,000 out of a mine this year and $7,000 next year and eight the next and he wants to bring this down to the present value, he used the table to bring them down to the present value.

Q. A straight annuity table did you use?

A. I used the table that would give me the present worth, expected profits at six years at six per cent.

Q. Don't you think the rate of six per cent is too low?

A. No.

Q. Is there any authority that supports you in saying six per cent is not too low?

A. I don't know that either, but I know we borrow the money for less than that for carrying on our business.

Q. Is there any authority that you know of that thinks that six per cent is too low?

A. I don't know. This question of interest rate has been fairly argued.

Mr. FOX. The point is this, Your Honor, that Pennsylvania Railroad bonds, which are supposed to be a conservative investment, show interest rates of six and seven per cent. Mining is hazardous, and in putting the present value you must take a higher rate there than you would in a conservative investment.

55

The COURT. I know the going rate of interest all through these years has been six per cent. I know what we were getting money in the bank for—six per cent right here in town. I suppose my brother

ellwood would charge me seven or eight per cent now, but I know ears ago I could get it for six per cent.

The WITNESS. The Pickands-Mather Company borrows money t 6 per cent for carrying on the business of mining, and therefore, e think that six per cent is adequate.

Q. You mean you can borrow six per cent for mining?

A. We do.

Q. Do you use six per cent as a basis of the recommendation to our company always?

A. We have always used six per cent.

Q. I mean when you are looking over property and figuring up s value, do you use six per cent when you submit it to your company?

A. Yes, sir; we did, because we make the other hazards sufficient o cover any question of difference in the interest rate—we have done hat in this case.

Q. In order to use six per cent basis rate, how thoroughly should he ore be explored in order to make it safe?

A. No more thoroughly than the Hudson mine was explored.

Q. You mean stripping would be enough?

A. The property wouldn't have to be stripped.

Q. Boring should be sufficient?

A. Yes, sir; on the Mesaba Range, it would.

Q. Boring should be sufficient to make a six per cent rate used?

A. Yes, sir. My answer to that—I said we took into account, as e did in this case, any of the hazards that might be reflected in the terest rate by making our costs conservative enough to take care f that.

Q. What were your costs based on?

A. Experience on other property.

Q. Experience of other properties?

A. At other properties.

Q. Were those properties similar as to the grade of ore and mixre of ore?

A. The grade of ore has very little to do with the cost of mining.

Q. I don't think that is responsive. Were these other properties similar as to grade of ore?

A. Yes; they were.

(Witness excused.)

JOHN S. LUTES, called as a witness on behalf of the plaintiff, beg first duly sworn, testified as follows:

Direct examination by Mr. BAILEY:

Q. How long have you been engaged in the mining business?

A. Twenty-six years this month.

Q. In what capacity for the last ten or fifteen years, or more?

A. General manager.

Q. For what concern?

A. General manager for the Todd-Stambaugh Company.

Q. Do you have charge of a large number of mines in Minnesota?

A. Yes, sir.

Q. Some in Michigan, do you?

A. Yes, sir.

Q. Are you the John S. Lutes that took a sublease from the Alworth-Stephens Company upon what is known as the Perkins mine?

A. Yes, sir.

Q. Did you assign that lease over to the Perkins Mining Company?

A. Yes, sir.

Q. Were you after that assignment interested in the Perkins Mining Company?

A. Yes, sir.

Q. Were you familiar, in a general way, at least, with the operation upon that Perkins mine in the opening up and development and shipment?

A. Yes, sir.

Q. What did you do to it—you were there from time to time, were you?

A. Yes, sir; occasionally.

Q. You have examined the grade of the ore from blue prints, of course?

A. Yes, sir.

Q. You knew it had been stripped?

A. Yes, sir.

Q. Was all of the ore that was finally stripped stripped as early as March 1, 1913?

A. I think so.

Q. As of that date, March 1, 1913, within what time was it reasonable to estimate that the ore so stripped would be all mined out?

A. I would say between five and six years.

Q. Was it, in fact, all mined out within a period of six years, or as early as 1919?

A. Yes, sir.

Q. Practically all as early as '18, was it not?

A. Yes, sir.

Q. As of March 1, 1913, what, in your judgment, was the value per ton of the ore in the Perkins mine that was stripped, in the ground—cash value?

57 A. Between seventy-five cents——

Mr. Fox. Same objection that applied to the other testimony.

The Court. Same objection, same ruling.

A. Between seventy-five cents and one dollar per ton.

Q. What, in your judgment, from the 1st of January, 1917, through 1917, was the ore that was so stripped and still remained there worth; was it at least as much as on March 1, 1913?

A. The same amount.

Q. As a matter of fact, it would be more, wouldn't it?
A. I didn't catch the question.
Q. Well, what would it be worth—was the value from January 1, 1917, through all of 1917—was the ore that was stripped there in the ground worth at least as much as that figure that you have stated; seventy-five cents to a dollar?
A. Yes, sir.
Q. Was it reasonable to estimate that as of the 1st of March, 1913, the ore would be mined out during the six-year period as fast in equal annual installments?
A. Yes, sir.

Cross-examination by Mr. Fox:

Q. Have you had any engineering experience?
A. Yes, sir.
Q. Are you a mining engineer?
A. Yes, sir.
Q. What basis do you use as the value of seventy-five cents to a dollar per ton that you placed for the ore in the Perkins mine?
A. The market conditions and the difference between the cost and production and what you get for the ore.
Q. Is that the value or the operating profit that you are using there as a basis?
A. The value.
Q. Isn't it an operating profit of taking a cost and deducting that?
A. That is also an operating profit.
Q. Then you say that the value and operating profit would be the same?
A. Yes.
Q. Is that to the fee owner or to the lessee?
A. Well, that would be in either case.
The Court. Provided the fee owner operated the mine?
The Witness. Yes: provided the fee owner operated the mine.
Q. You make no distinction between the value to the fee owner and to the operating lessee?
A. Yes; I would.
Q. What would that be?
58 A. If the fee owner operated the mine your value would be, I would say, much greater than I placed on the property at that time.
The Court. In other words, the fee owner wouldn't have to pay any royalty and the lessee would?
The Witness. Yes.
The Court. It would be just the difference of the royalty that the lessee would have to pay the fee owner?
The Witness. Yes. I think the value is very low for a property——
The Court. If you and I would mine a mine at equal expense and you had to pay me thirty cents before you got your profit out of it, your profit would be just that much less. That is all there is to it?

The WITNESS. Yes, sir.

Q. Then you would value a mine at the tonnage multiplied by the operating profit; that is your basis; that is the value?

A. Yes.

Q. The tonnage multiplied by the operating profit would give you the value?

The COURT. You would reduce that to the present value?

The WITNESS. Yes. I presume that is taken into consideration in your question.

Q. How would you then get that down to present value—you have got your estimate of tonnage times your profit—how do you get that down to present value?

A. From comparison with other property that I have figured.

Q. Similar in kind and character?

A. Well, each property has got to be figured on its own individual merits, and from it we take comparisons.

The COURT. In other words, it would cost you so much to mine ore out of that forty and only so much to mine it out of this forty?

The WITNESS. Exactly.

Q. Was the grade of ore in the Perkins mine low-grade ore?

A. No, sir.

Q. What was its grade?

A. I don't remember; I think about 49 or 50 natural; probably a little higher than that.

59 Q. Was it low-grade Bessemer?

A. No; it wasn't low-grade ore.

The COURT. Was it Bessemer or non-Bessemer?

The WITNESS. Non-Bessemer.

Q. Was it below standard?

A. No. I would like to add to that—if you mean below standard, below the best selling price, it was a little, but below the standard grade of ore that is being shipped from the Mesaba Range, it wasn't.

Q. Is that as easily marketed as the other?

A. Yes, sir.

Q. The ore in this case?

A. Yes.

Q. Isn't there a difference in the ease with which high-grade ores and various ores which are less value can be marketed?

A. Certainly.

The COURT. Did you understand that question, Mr. Lutes?

The WITNESS. I think so.

Q. That wasn't the highest grade ore?

A. It was the average.

The COURT. Doesn't it cost as much to take out sixty per cent as fifty—the steam shovel will take it all out about the same?

The WITNESS. Yes; but I understood it to be marketing that ore.

The COURT. Oh, I understood it was mining.

Q. In the case of a bad market you might have more difficulty in putting your product on the market if it wasn't a high-grade ore; isn't that true?

A. Yes; provided you had no contract to take care of it.

Q. That is one of the elements that should be taken into consideration in making your valuation?

A. Yes, sir.

Q. Was there any mixture in this ore in the Perkins mine?

A. I don't think so at this end.

Q. Was there any phos?

The COURT. Speak out.

Mr. BAILEY. What do you mean by mixture?

Q. Mixture of paint rock?

A. Well, I will withdraw that answer; there was very little mixture of paint rock.

The COURT. But there was a little?

The WITNESS. Oh, yes.

Q. There is a danger of losing some ore in this operation, is there not, by caving?

A. Very little.

Q. In other words, you get practically all that is there?

A. Particularly in the open-pit stripping operation.

Q. Was that true in the case of the Perkins mine?

A. Yes, sir.

Q. All of it was mined out?

A. Not quite all of it; we left a little in there.

Q. How much, do you know?

A. Oh, I should say—I wouldn't say—between twenty-five and fifty thousand tons.

The COURT. Well, you would have taken that out if you hadn't come to the end of your mining time and you didn't think it was worth while to go back there and get it the next season; isn't about that the size of it?

The WITNESS. That is about the fact.

(Witness excused.)

RICHARD M. SELLWOOD, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. BAILEY:

Q. Just so we will have it on the record, Mr. Sellwood, you are and have been for many years engaged in the mining business?

A. I have.

Q. Also in the banking business?

A. Yes, sir.

Q. You are president of the City National Bank.

A. Yes, sir.

Q. Have been for a considerable number of years?

A. Yes, sir.

Q. Your father was one of the very earliest miners on the Vermillion and Mesaba Ranges, was he not?

A. Yes, sir.

Q. You have been engaged in the mining business all your life?

A. Yes, sir.

Q. Were you president of the Perkins Mining Company, or what office did you hold?

A. I was president after my father's death; prior to that time he was president.

Q. What year was that?

A. February, 1914.

61 Q. Prior to that time your father was president of the Perkins Mining Company?

A. Yes, sir.

Q. That is the company that held this lease on this Perkins mine from the Alworth-Stephens Company?

A. Yes, sir.

Q. Can you tell at that time, the 1st of March, 1913, within what period it was reasonable to figure that the ore that was stripped would all be shipped—within what period after March 1, 1913?

A. Five to six years.

Q. It was, in fact, shipped within that period?

A. Practically within the six years.

Q. Was it reasonable to figure as of the 1st of March, 1913, that the shipment would be as fast as in equal annual installments?

A. Yes, sir.

Q. All the stripping that was ever done upon the property, the Perkins property, had been done prior to the 1st of March, 1913, was it not?

A. Yes, sir.

Q. And the ore uncovered?

A. Yes, sir.

Q. Mr. Sellwood, what, in your judgment, was the value of that ore as it was laying in the ground as of March, 1913, stripped as it was, cash value, the present worth, March 1, 1913, per ton?

A. It would be worth seventy-five cents per ton.

Q. Regardless of any loss?

A. Seventy-five to eighty cents a ton; we thought it was well worth seventy-five cents.

Q. That is the present worth of that?

A. Yes; figuring it over as being exhausted in the neighborhood of five or six years.

The COURT. Present worth, as of March 1, 1913, would be seventy-five cents a ton?

The WITNESS. Yes, sir.

The COURT. Is that to the lessee or to the fee owner?

The WITNESS. To the fee owner.

The COURT. The lessee; it would be thirty cents less than that if that was the royalty.

Q. They were paying seventy-five cents royalty?
A. The royalty was seventy-five cents a ton.
The COURT. You must have made about $1.50 then.
Mr. BAILEY. Well, let us get that clear.
Q. What did you figure it was worth to the Perkins Mining Company having to pay royalties on it as of the 1st of March, 1913?
62 A. To the Perkins Mining Company—seventy-five to eighty cents a ton.
Q. That is over and above the royalties?
A. Yes, sir.

The COURT. It was worth to the mining company right there in the mine?
The WITNESS. Yes, sir.
Q. That was a fair market value, of course.
A. Yes, sir.
Cross-examination by Mr. Fox:
Q. Is that the market value of the fee you are speaking of?
A. No, sir.
Q. What is it?
A. Of the lease.
Q. Oh, the value of the lease?
A. Yes, sir.
Mr. WASHBURN. He said it was worth seventy-five to eighty cents to the leaseholders on top of the seventy-five cent royalty.
Q. You are not a mining engineer?
A. Not graduated.
Mr. BAILEY. He is a practical.
The WITNESS. Practical.
Q. You value mines?
A. Yes, sir.
Q. Your value in this case is stated as the value of the lease?
A. Yes, sir.
Q. And not of the mine?
A. Yes, sir.
Q. Assuming that there was a lease—or, no—that there was a fee for the royalty of thirty cents, a sub-lease with thirty cents and twenty cents additional, with an operating profit of thirty cents additional royalty, would you pay the same amount for the fee that you would for the sub-lease, as a matter of investment?
Mr. BAILEY. Would you pay the same amount for the fee as for the sub-lease?
Q. Well, would you pay as much for the lessee's equity?
Mr. WASHBURN. What is meant by operating profit thirty cents additional royalty?
The WITNESS. I don't understand what he is asking there.
Mr. DONAHUE. Mr. Sellwood, assuming that there is in existence an operating lessee, such as you are or were, in this property, and

having an expected profit, such as you assume, of seventy-five
63 cents a ton, as an operator, and that you would operate under a sub-lease which carried an advance of thirty cents over the original lease from the fee owner, which was also sold for thirty cents, would you pay as much for the equity of the lessee as you would for the equity of the fee owner?

Mr. BAILEY. That is, you mean pay as much for the equity of the first sub-lessee as for the fee owner, is that it?

Mr. DONAHUE. No; if you had an option of purchasing any of these equities.

Mr. BAILEY. There are three equities.

Q. There are three equities there. Now, for which would you pay the most money?

A. The operator's profit to be limited to thirty cents.

Q. It is limited to the same extent with the ordinary expenses the operator's profit is limited and subject to the——

A. I would rather be the fee-owner than the operator.

Q. And lessee?

The COURT. You would rather be a fee holder with a royalty of thirty cents than an operator with a limit of seventy-five cents?

The WITNESS. No—he has limited it to the fee owner. He just sits back and takes the thirty cents.

Mr. DONAHUE. You would rather have the fee—the equity of the fee owners than the equity of the sub-lessor, with the provision in the contract in the original lease from the fee owner, providing for minimum royalties of a substantial amount, regardless of whether it was——

The WITNESS. I don't quite get that question there.

Mr. DONAHUE. You don't.

Mr. FOX. Is there any difference in the value between the equity of the sub-lessee and the fee owner and the sub-lessor, under the question that was stated?

Mr. WASHBURN. I think it is about time in the course of the examination of this witness to frame an explicit question in some form that maybe he can understand.

The COURT. Go ahead. Let him answer it if he can.

The WITNESS. The question is not very clear to me.

The COURT. Well, we will make it clear.

64 The WITNESS. The difference between the operator, now, and the sub-leaseholder?

The COURT. The operator is the sub-lease holder.

The WITNESS. There is another sub-leaseholder.

Q. You have got a fee with a thirty cent royalty, a sublease with a thirty cent royalty and an operating lessee with a profit of thirty cents. You testified that you would rather have the fee than chance the risk of the profit?

A. Yes. You limited this to thirty cents.

Q. Yes; you said you would rather have the fee than the risk of the thirty cents?

A. Yes.

Q. Of the other two which would be the more valuable?

A. I would rather have the fee than the other.

Q. You would rather have the fee?

A. Yes.

Q. You would rather have the fee than the sub-lease?

A. Yes, sir.

Redirect examination by Mr. BAILEY:

Q. Suppose you got a lease, number one, at thirty cents, a sub-lease we will call number two at thirty cents and a sub-lease by an operator where he stands a show of making, or where he can make seventy-five cents a ton, which of those three would you rather have, number one, two, or three?

A. Three.

Recross-examination by Mr. FOX:

Q. Do you know the tonnage in the Perkins Mine?

A. When?

Q. The actual amount mined out?

Mr. BAILEY. When?

A. We mined out——

The COURT. After the 1st of March, 1913.

Q. Yes; March 1, 1913?

A. I would say it is around three hundred and fifty or sixty thousand tons.

Q. What was the estimate on March 1, 1913?

A. Why, I don't recall—I would say it is somewhere between four hundred and fifty and five hundred thousand tons.

(Recess.)

65 Mr. BAILEY. I think, your honor, we have been able to agree upon a stipulation that will eliminate quite a little evidence. I will see if I can state it in a way that is satisfactory to counsel. It is stipulated that the number of tons in the two properties on the 1st of March, 1913, were the number of tons which were actually finally shipped and paid for under these leases, and that the value in March 1, 1913, was that number of tons as mined in equal annual installments and was paid for—reduced to present worth as of March 1, 1913, and figured it would be in equal annual installments during the period of seven years.

Mr. JAQUES. The Government objecting to the materiality of the amount of tons and number of tons at that time.

The COURT. Yes. Now, in that stipulation, you did not stipulate as to the number of tons.

Mr. BAILEY. We will offer that right after lunch.

(Adjournment until two o'clock, June 6, 1921.)

Afternoon session, June 6, 1921

(Statement marked for the purpose of identification as "Plaintiff's Exhibit 3.")

Mr. BAILEY. It is stipulated that plaintiff's Exhibit 3, which may be considered in evidence, shows the tonnages mined and shipped from each of the mines from March 1, 1913, to the end of the shipments. I take it, it will be stipulated that the value of the ore in the mine during 1917 was at least as great as the previous stipulation, as it was in March, 1913.

Mr. DONAHUE. Per ton.

Mr. BAILEY. Yes; per ton.

Mr. FOX. Yes.

Mr. JAQUES. I didn't want to stipulate to any value at all. I thought we were stipulating to the amount of ore in the mine on that date, not as to the valuation. Exhibit 3, I don't know anything about it; we were to add to that stipulation the amount of ore in the mine on March 1st. What I want stated is the amount of ore that they have mined since March 1st, out of each of these mines.

Mr. BAILEY. Does that show anything contrary?

66 Mr. JAQUES. We want the exact amount, it being 367,791 tons for the Perkins mine, and for the Hudson 839,207.

Mr. BAILEY. I supposed it was agreed that these gentlemen were to give up the figures and bring them in, and I suggest that we adjourn a minute and——

Mr. JAQUES. At noon we were to add to that stipulation the exact amount that was mined out.

Mr. WASHBURN. It was agreed Mr. O'Donnell should make a total of the shipments on March 1, 1913.

The COURT. It is just a mere matter of computation, is it not?

Mr. JAQUES. As to the value, I did not want to stipulate at all.

Mr. BAILEY. You have already stated as to the value March 1, 1913.

Mr. JAQUES. I haven't stipulated to any value at all.

Mr. BAILEY. Will you agree that the payments for the ore as shipped were made in accordance with the lease?

Mr. JAQUES. I don't see how that makes any difference to the Government or to this case.

Mr. BAILEY. Well, if it doesn't it will not hurt you. We think it does.

Mr. WASHBURN. I think that is all covered by the statement of the receipts.

The COURT. Does the plaintiff rest?

Mr. BAILEY. Plaintiff rests.

FRANK J. O'DONNELL, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Fox:

Q. Will you state your occupation in connection with the plaintiff company?

A. Accountant.

Q. Are you familiar with the books of account of the company?

A. I am.

Q. Are you familiar with the returns that have been filed
67 under the corporation excess tax of 1909 and the income tax act of 1913 and the act of 1916?

A. I am.

Q. Are you familiar with the transactions relating to the leases in this case?

Mr. WASHBURN. That is indefinite for him.

Q. I have here the original return, the annual return of net income of the plaintiff for the years 1909 to '16, inclusive, as well as certified copies of these returns. I am going to hand you the originals and ask you if you can identify the handwriting, and I would like to introduce the certified copies.

The COURT. We will get to that later on. Go on with the witness.

Q. Do you know whose handwriting appears on the return for 1909?

A. Yes.

Q. Please state.

A. That is—the handwriting on the return of 1909 is L. T. Feetham's, who was secretary of the company at that time.

Q. I hand you the return for 1910. Whose handwriting is that?

A. George W. Hart's, assistant treasurer of the corporation.

Q. I hand you the return for 1911. Whose handwriting is that?

A. You mean in the body?

Q. In the body of it.

A. That looks like Mr. Bailey's.

Mr. BAILEY. What year is that?

Mr. FOX. 1911.

The COURT. W. D. Bailey.

Q. The return for 1912?

A. That is George W. Hart's, assistant treasurer of the company.

The COURT. In what position did Bailey act in the company?

Mr. BAILEY. Attorney and stockholder is all.

Q. And the return for 1913. Whose handwriting in the body of it?

A. Phillip L. Ray's.

The COURT. Who is he?

The WITNESS. He is Mr. Washburn's assistant.

Q. I hand you the return for 1914.

A. That is mine.

68 Q. You will note the margin of the return 1914; there is a statement written. Is that the same handwriting as appears in the body of the return?

A. It is.

Q. Will you please read that statement into the record?

A. "This company owns no land; it only obtains its revenue by leasing and sub-leasing lands."

Q. I hand you the return for 1915. In whose handwriting is that?

A. That is mine.

Q. There is also a note which I will ask you to read; there appears on the margin of it, of the return for 1915, a note. In whose handwriting is that?

A. That is mine.

Q. Will you read the statement?

A. "This company owns no land and only obtains its revenue by leasing and sub-leasing land."

Q. I hand you the return for the year 1916.

A. That is mine.

Q. If you will look through those returns, it appears, does it not, that they are made upon the basis of rents and royalties received?

Mr. BAILEY. I think they show for themselves. I rather object to it as immaterial.

The COURT. Do they show for themselves?

Mr. FOX. They do show for themselves.

The COURT. Will they be in evidence?

Mr. FOX. I wish to introduce certified copies of the returns from 1909 to '15 filed by the plaintiff company.

The COURT. Is there any objection to the certified copies of these returns being entered instead of the originals?

Mr. FOX. No.

The COURT. It being understood these questions are being asked of the originals.

Mr. FOX. The only point I want to bring out through the original there was the fact that the company has treated these receipts and disbursements as royalties rather than income sales.

The COURT. It appears on the certified copies, does it?

Mr. FOX. Yes; as for rents and royalties received.

(Transcript of record above referred to marked for the purpose of identification as "Defendant's Exhibit AA.")

Q. You testified that you handled the bookkeeping of the plaintiff company?

A. Since 1914.

69 Q. Were the payments in the case of the Perkins mine always paid quickley?

A. Always.

Q. In the year 1914 weren't the minimum payments waived in the case of the Perkins mine?

A. They were—I think it was in 1914.

Q. And in 1915?

A. I think so. You asked me when they were paid—they were paid quickly—I said yes.

Q. Were any of the payments at any time in the Hudson lease, that is, the minimum payments, waived?

A. Not to my knowledge.

Q. Only in the case of the Perkins mine?

A. That is as I understand it.

Q. Are these two occasions in 1914 and '15 the only times at which the minimum payments were waived?

A. So far as I know.

Cross-examination by Mr. BAILEY:

Q. The payments were made for all the ore shipped, were they not—took the rate specified in the lease?

A. Yes, sir.

Q. It was simply the minimum payments were waived for the time being?

A. Yes.

Q. They weren't entirely waived—just temporarily?

A. Yes, sir.

Q. And later made?

A. That is it—I think it was two quarters.

Q. You mean the total time that they were waived was just two quarters?

A. That is as I understand it.

Q. So you don't mean they were waived for all the years 1914 and '15?

A. Yes, sir.

Q. But they were just for two quarters?

A. Yes, sir.

Q. During that period of two years?

A. Yes, sir.

Mr. WASHBURN. There should be one correction to the witness's testimony. At the final cleaning up of the Hudson mine, it wasn't quite all mined out and around the edge of the pit and they said if we would waive the minimum royalty during the winter, they would keep the water out of the mine during the winter and in the spring would take out the balance—clean up around the edge, so that there was that much of a waiver on the Hudson mine. That is correct, isn't it?

The WITNESS. That is correct.

70 Redirect examination by Mr. FOX:

Q. The bulk of the payments fell in October, did they not?

A. As a rule; yes.

Mr. WASHBURN. That paper shows that.

(Witness excused.)

F. G. DONAHUE, called as a witness on behalf of the defendant being first duly sworn, testified as follows:

Direct examination by Mr. Fox:

Q. What is your occupation?

A. I am a mining engineer.

Q. Will you state your experience and qualifications, including education?

A. I graduated from Michigan College in 1904, and since that time I have been practicing the profession of mining engineering in Butte the iron mines of Michigan, and in the city of Washington, D. C. as a valuation engineer in the income branch of the Internal Revenue Bureau.

Q. Have you had any experience with other mines, such as zinc and lead?

A. At the present time I have charge of the valuation of the lead and silver mines, the zinc mines and ore mines in valuation section.

Q. In the valuation of mining properties is it customary to have some basis for the purpose of making the valuation?

A. It is customary.

Q. What are the factors that enter into the valuation of a mine?

A. The fundamental provision in mining property is that it shall return the money actually invested at the end of the life of the mine and that it shall pay an adequate rate of interest on the money invested during its life.

Q. There are other incidental factors which enter in the value?

A. There are other factors which are used in determining the value; the reserve of the mine must be known or estimated; the grade; the expected price for the product of the mine and the expected costs. When the previous factors have been estimated in the cost to the extent of the best judgment of the person making the valuation, then it is necessary to fix on the risk rate that
71 attaches to the venture. The risk rate is determined by number of factors. In the case of any mine the length of life of the property would affect the risk rate which would be used in determining its value. The vicissitudes of operation have a tendency to equalize the risk and therefore, would determine a lower rate on a longer life property.

Q. Are there certain recognized authorities upon valuation of mines and the factors to be used in determining the value and the basis of arriving at the value?

A. The engineering profession recognizes such authorities as Hoover, Findley, and others—Mr. Hurd—there are a great number of authorities on the subject of mines valuations.

Q. Will you explain the determination of the risk rate to be used in iron mining; that is, with reference to the authorities on that subject and your experience?

A. I can quote Mr. Hoover.

Mr. BAILEY. I don't understand that question. You say explain the risk rate to be used. What do you mean, that is used in the department?

Mr. FOX. Generally used in valuing mines—generally used by engineers.

Mr. BAILEY. That is objected to as immaterial.

The COURT. He may answer. Proceed.

A. I would like to read Mr. Hoover's statement on minimum risk rates, which would give us a basis to start from, a recognized authority.

Q. Please state the title of the work that you are reading from, and the page.

A. This is Hoover's Principles of Mining, page 42, chapter 5, headed "Mine valuation."

Mr. BAILEY. I take it this is not going to cover the whole volume.

Mr. FOX. One paragraph.

A. (Reading:) "Redemption or amortization of capital and interest. It is desirable to state in some detail the theory of amortization before consideration of its application in mine valuation. As every mine has a limited life, the capital invested in it must be redeemed during the life of the mine. It is not sufficient that there be a bare profit over working costs. In this particular, mines differ wholly from many other types of investment, such as railways.

In the latter, if proper appropriation is made for maintenance,
72 the total income to the investor can be considered as interest or profit; but in mines a portion of the annual income must be considered as a return of capital. Therefore, before the yield on a mine investment can be determined, a portion of the annual earnings must be set aside in such a manner that when the mine is exhausted the original investment will have been restored. If we consider the date due for the return of the capital as the time when the mine is exhausted, we may consider the annual instalments as payments before the due date, and they can be put out at compound interest until the time for restoration arrives. If they be invested in safe securities at the usual rate of about 4%, the addition of this amount of compound interest will assist in the repayment of the capital at the due date, so that the annual contributions ot a sinking fund need not themselves aggregate the total capital to be restored but may be smaller by the deficiency which will be made up by their interest earnings. Such a system of redemption of capital is called 'Amortization.' Obviously, it is not sufficient for the mine investor that his capital shall have been restored, but there is required an excess earning over and above the necessities of this annual funding of capital. What rate of excess return the mine must yield is a matter of risks in the venture and the demands of the investor. Mining business is one where 7% above provision for capital return is an absolute minimum demanded by the risks inherent in mines, even where the profit in sight gives warranty to the return of capital. Where the

profit in sight (which is the only real guarantee in mine investment) is below the price of the investment the annual return should increase in proportion. There are thus two distinct directions in which interest must be computed—first, the internal influence of interest in the amortization of the capital, and, second, the percentage return upon the whole investment after providing for capital return."

Q. It has been testified in the present case that a six per cent straight discount rate was used in determining a value of the mines in this case. In your opinion, is that a proper basis for valuation?

A. It is not.

Q. State in what particulars it is not a proper basis for a valuation.

A. I think an engineer in the profession generally would call a seven per cent a minimum, such as Mr. Hoover has used in his statement that I have read. In the cases of the two mines here under consideration you have a sub-lessor who takes the risk, if we are going to the establishment of the equity of a sub-lessor; he takes the
73 risk of abandonment of his lease by the lessee, the payment of State taxes and minimum royalties, which are in addition to the ordinary risks that a fee owner has and much more—they approach him closer than they do the fee owner, he being at a point where his profit doesn't vanish as soon as the fee owner's profits.

Q. Do you mean to say that the value to the fee owner and the value to the lessee are separate and distinct?

A. Why, yes.

Q. In what way?

A. The fee owner has parted with a certain equity in the land when he leases the property. The lessor's interest would be measured by what he can reasonably expect, or what anybody would value his expected royalties on the basis of the risk of his getting them, and the market condition, and so on.

Q. Would there be a higher risk rate for a lessee than there would be for a fee owner?

A. Yes. The point at which his profit would vanish entirely is much nearer than the point at which a fee owner's would.

Q. With reference to the mines in the present case what would be in your opinion, a proper basis for valuation?

A. On using a formula such as Mr. Hoover outlines, in which a provision is made for the return of capital at the end of the investment, a reasonable interest in your money while it is in there, or on the Hoskold formula, which is used in the metal valuation section I would say that for a property such as the Hudson an eight per cent risk rate would represent the absolute minimum, with a four per cent amortization rate.

Q. And what would be the valuation in the case of the Perkins mine?

A. In the case of the Perkins mine you have a higher rate of royalty and somewhat lower grade ore, a considerable greater risk on fluctuations of your product, and you also have an ore which ad

mittedly is more difficult to market than the ore in the case of the Hudson, and I think that a minimum of ten per cent should be used for the interest and the same amortization rate, four per cent.

Q. Have you any calculation of the values of these two properties?

A. I haven't figured the absolute figures, but I can give you the percentage of the total expected royalty which would be represented by present value on these formulas in these cases over the life we have agreed to for these properties.

74 Q. Have you any other authorities that you are basing these valuations on that you would want to read into the record?

Q. I don't think it is necessary to encumber the record with any more. Authorities are almost uniform on the subject. There are numerous formulas for valuing properties; but if they use one system in which eight per cent is designated as the interest rate and which is computed on a different basis than the return of the amortization of the original capital with a four per cent interest rate, why, they use a higher rate or they get it some other way, but they get practically the same results regardless of the exact formula used.

Q. The engineer who testified for the plaintiff company based his valuation upon a six per cent straight discount rate and used in support of that Hurd's tables. You are familiar with Mr. Hurd's work?

A. I am.

Q. Is there anything in that work which would permit a six per cent straight discount rate?

Mr. BAILEY. That is objected to as incompetent, irrelevant, and immaterial. Mr. Rose said he used the table and computations as to discount in Mr. Hurd's book, but he didn't say that he relied upon Mr. Hurd for anything else.

The COURT. That is what I understood, but I think he may answer.

A. There is nothing—the advice of Mr. Hurd——

Mr. BAILEY. The question calls for yes or no.

A. There is nothing that directly prohibits your using six per cent if you want to use it.

Mr. JAQUES. What is Hurd's rule? That is what we want to get at.

Mr. BAILEY. That is objected to—call Mr. Hurd if you want to.

Mr. JAQUES. We didn't call Mr. Hoover.

The COURT. What does he do in this book?

Mr. BAILEY. I object to getting into Mr. Hurd's book without he being here. I had Mr. Hurd on one lawsuit, and they talked about his seven and eight per cent; in that lawsuit he came in and testified about four per cent. If he is here, I would like to cross-examine him. I did it once, and I can do it again.

The COURT. Have you Mr. Hurd's book here?

75 The WITNESS. Yes, sir.

Mr. BAILEY. I would like to cross-examine Hurd on it if he wants to testify. I object on the further ground it is not the best evidence.

The COURT. The rule will show in the book.

Mr. FOX. The witness has read the book. He can state the rule.

The COURT. Give his rule.

Mr. BAILEY. Exception.

The COURT. I do not care anything about this rule—just give your idea as to value. You give your testimony and these other men will give theirs.

The WITNESS. Mr. Hurd says, on page 32 of his Iron Ore Manual, Lake Superior District, 1911 Values, after discussing the factors which determine the risk rate to be used in valuing mine royalties: "Under all these conditions such an investment demands and is entitled to a high rate of interest, even greater than a highest grade preferred stock or bond security would yield. Capitalists would not entertain the purchase of such a proposition at ordinary rates of 5, 6, or even 7%. While 10% seems to be the customary prevailing interest rate, it would appear that 7% to 10% should be now used in calculating the present value of iron or royalties—that is, the investment required to purchase the royalty rights of a mineral lease containing known developed tonnage of merchantable iron ore."

The COURT. Is that all?

The WITNESS. Yes.

Mr. WASHBURN. What is the date of the book?

Mr. BAILEY. 1911. Then in the face of his book he comes in and testified to four per cent in a case I had.

Mr. JAQUES. You would have to testify to that.

Mr. BAILEY. This witness is being allowed to testify to what Hurd said.

The COURT. Do you want to get the value of the stuff?

Mr. FOX. Yes.

The COURT. Then ask him that.

Q. What value do you place upon these properties?

76 Mr. BAILEY. That is covered by the stipulation, what the value is. We have stipulated that.

Mr. JAQUES. I cannot recall any such stipulation. If there is any such stipulation like that I don't know anything about it.

The WITNESS. I think the stipulation if read, it will show they have agreed that the value of these properties shall be the royalties on a seven-year annual payment basis, reduced to present worth at some risk rate to be determined by the court.

The COURT. I do not understand this risk rate. Is there any risk in mining this iron ore up here?

Mr. BAILEY. It seems to me to be a special risk after the mine is uncovered; then there becomes a special risk after the mine is stripped.

Q. Will you explain what you mean by a risk rate?

A. I mean the interest that a man would require on his principle while it is invested in that sort of a venture, in addition to the return of his capital at the end of the life of the property. I think

o arrive at what the court desires I have here a Hoskold formula which applies the Hoover principal. I would like to state what percentage of the total expected royalties would be represented by value, using that table. It would put it in a better light.

Mr. WASHBURN. Is that table or that formula you are about to read based on an annual basis or accumulated basis?

The WITNESS. An annual basis.

The COURT. In this particular case, hasn't this worked out just according to these other calculations?

Mr. JAQUES. The risk rate is what they used to find the present worth.

The COURT. It was all mined out in a certain time.

Mr. JAQUES. If there is any issue about the value at all, it is March 1, 1913, and not now.

Mr. BAILEY. Go ahead.

A. On the basis of a seven-year life the percentage of the total expected royalties, represented by present worth, would be 69.1435 of the royalties.

Mr. BAILEY. What is that figure?

77 The WITNESS. 69.1435.

The COURT. Per cent?

The WITNESS. Per cent.

The COURT. In other words, if you were going to get at a million ton at 40 cents, that would be $400,000, wouldn't it?

The WITNESS. Yes.

The COURT. The present worth in ten years would be 69 per cent—$400,000?

The WITNESS. Yes; on the basis of ten per cent risk rate for the Perkins it would be 66.3032 per cent.

Q. It is claimed by the plaintiff company that 80 per cent represents the value as of March 1, 1913. In your figures, what would be the percentage?

A. I have just stated in my figures.

Q. Oh, yes; the difference between your value and theirs is based upon what—how do you account for the difference between your valuation at 69 per cent and their valuation at 80 per cent?

A. I don't think a valuation based on 80 per cent of the total royalties is a reasonable basis.

Q. Why?

A. Well, it rather outreaches a man's common sense to say that a man will pay 80 per cent of the total cash which he is going to receive in dividends out of a sublease dated March 1, 1913, for that equity.

Q. You make a distinction between the equity of a fee owner and the equity of a sublessee, then?

A. Yes.

Q. The value of the equity of the fee owner and the value of the equity of a sublessee differs?

A. Yes, sir.

Q. About in what proportion?

A. In the case of a lessee operator with similar conditions to what has been testified to as the condition of the Perkins, I would say 12 per cent would be a fair risk rate for the sublessee. That is, by the lessee I mean your third man in here, the operating company, paying a 75 per cent royalty and who depends on his profits for the excess over that amount.

Q. Then you make a distinction between the equity of the fee owner and the lessee and the sublessee?

A. In the risk rate.

Q. Risk rate increases?

A. Yes, sir. Mr. Sellwood has testified that he would pay more, which, in effect, means he would use a higher risk rate
78 in discounting his expected return on a property, than he would be on a fee owner——

The COURT. If I understand your testimony in calculating the present value you used 12 per cent?

The WITNESS. He has asked me about hypothetical cases, not this case.

The COURT. What do you say in this case here?

The WITNESS. I used 8 per cent on the Hudson mine and ten on the Perkins.

Mr. FOX. I have here, Your Honor, a certified copy of a statement of tonnages, grades of iron ore in these properties, the assessed values and the rate of assessed value per ton for the [year] 1913 and '14, submitted to the Minnesota Tax Commission, that I would like to introduce in evidence, and have the valuation explained by the witness—it is as near as we could get to the year 1913.

Mr. BAILEY. That is objected to as incompetent, irrelevant, and immaterial, and no proper foundation laid.

The COURT. Oh, I think they may be received.

Mr. FOX. They had to value these properties.

The COURT. That is what they said.

Q. That is what these reports are based on, data submitted by the operating lessee, is that correct?

Mr. BAILEY. The certificate shows for itself what it relates to.

A. It has the assessed value determined by the State tax commission.

The COURT. Of the ore in the ground?

The WITNESS. Yes. The State tax commission's reports show this is 47.63 per cent of the actual value.

Mr. BAILEY. Then, they didn't value that according to law. You have to take into consideration when you determine the value of the property what a man is ready to pay for it?

The WITNESS. Exactly.

(Letter marked for the purpose of identification "Defendant's Exhibit BB"—report marked "CC.")

The WITNESS. They take into consideration the fact that you
79 have a well determined ore body. The zinc bodies of Missouri during war times were valued at a 20 per cent risk rate.

Cross-examination by Mr. Bailey:

Q. You wouldn't think, would you, under circumstances of this case, that the fee owner who got 30 cents per ton royalty on the ore in these mines had any real risk, would you, in his investment?

A. The fee owner?

Q. The fee owner, I said.

A. Some risk.

Q. What risk has he got; he has got his ore?

A. He is taking chances on the market; that is his big risk.

Q. If the lease is drawn up when the mine has been stripped why he can lease it for twice or three times——

A. Yes.

Q. Then the risk is all on one side, and the risk that he takes is that he is getting more than his lease calls for; is that the only risk he takes?

A. No.

Q. Why isn't that so?

A. Because if you had panicky conditions for a couple of years your ore wasn't premium ore, you might find that you couldn't market it for a few years and you might have to pay the State taxes.

Q. But you have heard the testimony in this case that the ore was worth from $1 to $1.50 to the third lessee in 1913. Now, that being so and there being a sixty and seventy-five cent royalty ahead of that one dollar or dollar and a half, there is no question at all but that the fee owner was going to get at least thirty cents, is there?

A. There is not very much question about it.

Q. If that is so, where the third lessee, the Perkins mine, had $1 to $1.50 profit to them, the second lessee didn't take much risk on his thirty and forty-five cents, did he; not very much?

A. He took some risk, but not much.

Q. Did he take some risk?

A. I have testified as to what I thought the proper risk rate was.

Q. Did he have any risk?

A. He did.

Q. Where there was $1.50——

A. You are testifying to that; I am not admitting that is a correct expected profit.

Q. You are testifying to a lot of tables. I am trying to get you down to a lot of facts. If that ore in the mine was worth $1 to $1.50 to the third lessee, why the second one didn't take much chance on his royalty; that is true, isn't it?

A. That is true.

Q. These tables that you have referred to are tables, as a rule, gotten up to apply to an operating lessee, are they not? That is the risk that he would take——

A. They are gotten up to apply to anybody using the proper risk rate to apply to any expected profit on anything.

Q. They are really gotten up to apply to the fellow who is takin the risk on the rising and falling of the market and taking most o the risk on that, are they not?

A. Depending on where you use them, these tables go from fou per cent risk rate up to twenty.

Q. That is where you use them on the fellow that profits——

A. We use them on anybody.

Q. You use them flatly—it doesn't make any difference whethe a man is a lessee or lessor, or whether his land is valuable or not; i that it?

A. No, sir; that isn't it. If you mean by flatly, if we use the sam rate on all those people, that isn't it.

Q. Now, you referred to Mr. Hoover's book; as a matter of fac he gives the present worth—this seven per cent that you referred t as a discount and the four per cent reinvestment—he gives it on per cent basis as 5.09 for seven years; that is, the present wort would have $1 for seven years as 5.09, does he not, on page 46 of hi work?

A. Yes, sir.

Q. 5.09, seven years what?

A. Seven per cent risk rate.

Q. And that is on the basis of what you claim was a proper rat to apply, was it?

A. No, sir.

Q. You referred to him as a mining authority?

A. No, sir. I referred to him as authority as to what a mini mum risk rate should be in a mining venture; he is an authority o other risk rates. I have only committed himself in the thing I rea to a minimum risk rate.

Q. That is figured on an annual instalment basis?

A. Yes, sir.

Q. That figures about 73 per cent of each dollar that you ar going to get as the present worth at the beginning of the seven-yea period?

A. I haven't figured it.

Q. That is it approximately. It amounts to about 73 per cent o every dollar that you would get?

A. Yes.

Q. If you figured it on an accumulated basis it will amount t somewhat more?

A. Yes.

Q. On a six per cent he gives how much; 5.36 present worth?

A. Yes, sir.

Q. Figuring discount six per cent and reinvestment four pe cent?

A. Yes, sir.

Mr. WASHBURN. What would that amount to?

81 Q. That would amount to about 77 per cent of every dolla you are going to get, wouldn't it, 76⅔ per cent approximately

A. I haven't answered that yet.

Q. You just have to divide that by seven, don't you?

A. Yes.

Q. That would give 76⅔ per cent, as I figure it?

A. That is about right.

Q. Now, take Mr. Hurd's table, that you referred to, on a six per cent discount rate for the seven-year period, and you find that the present value of the $7 table for seven years is $5—70.61 per cent?

A. Yes, sir.

Q. Which amounts to 81.51 per each dollar, does it not?

A. I haven't figured it.

Q. Well, approximately.

A. Approximately, yes.

Q. And that, you understand, is taken on the accumulated basis?

A. Yes.

Q. And that makes the present value quite a little higher than the annual basis?

A. Yes, sir.

Q. This is on an accumulated basis in this case?

A. Yes. In this case, as you found from your return from your royalty and that most of your money would come in in October—that is, after the three big shipping months.

The COURT. There wouldn't any come in from the 1st of January to the middle of July?

The WITNESS. No. Their minimums would come in then.

The COURT. Yes.

The WITNESS. Unless they were ahead on their minimums.

Q. In your computation you didn't use any accumulated basis—you knocked it off on an annual basis?

A. Yes.

Redirect examination by Mr. Fox:

Q. What reasons do you give for figuring this value on an annual basis rather than an accumulated basis?

A. Well, there is some reason for figuring it somewhere between those two, but a good portion of the royalties come in in October—you can go into these valuations and you can get into a fine lot of technicalities if you try to get every nickel just where it ought to be—your opinion wouldn't be within ten per cent of the actual value.

Mr. BAILEY. You know we figured on a trifle less than 60 per cent: you know that, don't you?

The WITNESS. Yes.

82 Mr. BAILEY. As a matter of fact, we are entitled to 81½?

The WITNESS. Yes.

(Witness excused.)

HERMAN L. SIMCOE, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Fox:

Q. What is your occupation?

A. Internal revenue accountant.

Q. State your experience?

A. After finishing school I entered the employ of the Government; about seventeen years been a constant student of accounting ever since; I have handled the auditing of the largest corporations in the United States.

Q. How many years have you been with the Government?

A. Seventeen years.

Q. As an accountant how long?

A. Four years.

Q. Will you state to the court how corporations are classified for the purpose of taxation under the excess profits tax act?

Mr. BAILEY. By whom?

Mr. FOX. By the department.

Mr. BAILEY. I don't know as that is material. Objected to as immaterial.

The COURT. I think he may answer.

A. The law and regulations has promulgated——

Mr. BAILEY. That isn't the question.

Q. What I want is the classification.

A. To be taxed under sections 201, 209, and 210.

Q. State where a corporation made the returns that are filed, how they are classified in those three groups.

Mr. BAILEY. By whom?

Mr. FOX. By the department. That is for the purpose generally of administering the income tax and the excess profits tax provisions.

Mr. BAILEY. Well, I take it that the court will probably
83 hear the evidence, but that is immaterial, because that is the very question we are scrapping about here—they haven't classified us right; I don't know why he should go ahead and classify them—if they generally classify them wrong, it doesn't win their case for them.

A. The return comes in and it shows that the income was derived under the '17 law from either a corporation, partnership, or individual. It shows salaries, or commissions. Where there is no evidence of an investment that would be thrown under section 209 and taxed at eight per cent—if the nature of that business—we could tell by the return that the nature of that business required an investment, it would immediately be thrown under section 201—if after when it had been audited we found that the net income was out of proportion to the invested capital, or books had not been kept—books of record had not been kept and it was impossible to find what the investment was, it went to section 210, which constructed an

invested capital and taxed them as other corporations in that vicinity were taxed.

Q. 210 is corporations where the invested capital cannot be determined and are placed under that for the purpose of assessment, are they not?

A. Yes, sir.

Q. In the case of the plaintiff under what provision were they taxed?

A. Under the provisions of section 210.

Q. In other words, the invested capital was constructed for this company?

A. Yes, sir.

Q. Amounting to what?

A. I believe it was around $181,000.

Q. What was the percentage of the tax that was assessed against the plaintiff company?

A. 31.7, I believe for excess profits tax.

Q. In the matter of the assessments upon mines and particularly coal mines, is that, after your examination of a great many returns, a high or low rate?

Mr. BAILEY. That is objected to as immaterial and not the best evidence, and calling for a conclusion and for something that is not in evidence before the court.

The COURT. I think he may answer.

A. That is a low rate.

Q. What is the average rate?

Mr. BAILEY. Same objection.

The COURT. Same ruling.

84 A. I have seen many of them taxed 48 and 49 and I believe a few at 51 per cent.

Q. Have you examined the books of the plaintiff?

A. Yes, sir.

Q. What books have you examined?

A. Journal, cash book and ledger and books of account and the minute or record book.

Q. What did those books show as to the invested capital of the plaintiff?

A. They show an invested capital of——

Mr. WASHBURN. It strikes me that that is a little bit over the line. The books are here.

Q. State that by reference to the pages of the books. Give the books to the witness.

Mr. BAILEY. The figures are already in. Now, all he is testifying to is a conclusion. I don't care so much about it as far as Your Honor is concerned, but if it is appealed and that goes in the record, some one that is not familiar with it, as Your Honor is, are liable to take such statements as the cost at par.

The COURT. The invested capital is shown in the books.

Q. The invested capital of this company is shown on these books?

A. What was turned in was, a statement of receipts and disbursements—it doesn't show *show* the invested capital.

Q. I hand you Exhibit E, which has gone in and shows a statement of the receipts and disbursements from 1908 to date—does that show, or has that anything appertaining to the amount of invested capital?

A. It might show it, but necessarily doesn't show from what is meant by invested capital.

Q. What do the books of the company show as to invested capital?

Mr. BAILEY. That is objected to as calling for a conclusion. Let them put in the figures if they want to and just what we did get and where we got it from.

The COURT. You can cross-examine him as to the figures. Can you take the books and figure out what was the invested capital?

The WITNESS. Yes, sir.

The COURT. As of the 1st of March, 1913?

A. No, sir.

Q. What was the invested capital?

A. The invested capital as of date of acquisition, $25,000
85 stock subscription, an investment in mining leases, $17,868.50, which part of it was reinvested in further exploration, making December 31, 1909, $38,995.

Mr. BAILEY. As of what date?

The WITNESS. December 31, 1909.

Q. Referring to paragraph seven of the stipulation of facts in this case, we find the item of $17,868.50, alleged to be a return of of exploration expenditures under these leases——

Mr. WASHBURN. That is under the Perkins?

Mr. FOX. Under the Perkins lease.

Q. Is that amount part of the invested capital of this company?

Mr. BAILEY. That simply calls for a conclusion. It does not call for any fact at all. That is objected to for that reason.

The COURT. Do you estimate that is part of the invested capital?

The WITNESS. That is invested capital.

The COURT. That is your view of it?

The WITNESS. In the Department's opinion.

Q. What do you base that on—explain that item from a bookkeeping and accounting standpoint?

A. That should be on the balance sheet of the cost of the lease.

Q. In what account?

A. In the lease account, or leasehold, or any account you might name it.

Q. From the books of the company, as you examined them, will you refer by item to what, in your opinion, the invested capital of this company consists?

Mr. BAILEY. That is objected to as calling for a conclusion of the witness on the very point that is at issue before the court.

The COURT. He can be examined as to that conclusion. Answer the question.

A. The invested capital of this company consists of its expenditures for exploration, all found on various pages in both the ledger and the cash book.

Mr. WASHBURN. And as shown by the items on the exhibit that you have just referred to?

The WITNESS. As the items are on Exhibit E.

Q. What do the balance sheets of this company show?

A. I haven't seen any balance sheets of this corporation.

Q. Referring again to Exhibit E, what does that show as to invested capital?

A. That shows up at the end of 1912, $40,068.

Q. From examination of the books of the plaintiff, what was their invested capital in the year 1917, in your opinion?

Mr. WASHBURN. That is objected to, if the court please. That is what this court is going to find out.

Mr. FOX. He has been through the books.

The COURT. I think he may answer the question.

A. The books of account don't show the correct invested capital of that date. I have, however, calculated what it should be.

The COURT. Why do you say that; what do you mean by that? Do not the books of account show all those transactions?

Mr. FOX. They show all of the items.

The COURT. Do not they show all of the transactions?

Mr. WASHBURN. Absolutely.

The WITNESS. No, sir; they don't show the proper provisions for amortizing the leasehold costs.

Mr. FOX. I think he means it is not labeled on the books that way. The accounts, however, show that there was—does the account show there was an invested capital in the year 1917?

The WITNESS. The accounts show there was an invested capital on that day.

The COURT. How much?

The WITNESS. They show $25,000 paid up; they call it paid-up stock.

The COURT. I can understand that. If we get together and put $25,000 in it, and if in addition we go and buy a lot of leases, we have got that much more in; if we add to that $25,000 and
87 start to buy a lot of leases, we have got that much more in, and if we add the expenses of exploring, we have got that much more in.

Q. Was there any addition to the $25,000 paid in?

A. Well, there was the earnings reinvested.

Q. Explain that item.

A. They were reimbursed for $17,868.50.

Q. That appears how on the books?

A. You mean the returns of the company?

Q. How does it appear on the books?

A. It appears both ways, as costs of exploration and it appears as repayment.

Q. Do the books show that $17,000 was spent in the business?

A. Yes, sir.

The COURT. Did somebody else pay that back?

Mr. WASHBURN. Sure, it was paid back.

The WITNESS. The corporation made money, and it came back to the corporation again, but not the stockholder.

Mr. FOX. But this money came back to the corporation as invested capital, but how it got to the stockholders is a different proposition.

Q. Then this item of $17,000 was also invested capital of the company?

A. Yes, sir.

Q. And that appears from the books of the company?

A. Yes, sir.

Q. That would make a total, then, of invested capital of how much?

A. $38,995 is my figures.

The COURT. $17,000 and $25,000 is $42,000. How do you get $38,000?

The WITNESS. There is probably a little duplication there of earnings, coming back and then being reinvested.

Q. What was their actual invested capital as of January 1, 1917, about?

A. Using the tonnages that are given to me, I made a calculation of about $8,000; that would be the invested capital January 1, 1917.

The COURT. It has been reduced from $38,000 to $8,000?

The WITNESS. Yes, sir; through dividend payments.

Q. How is that reduced?

A. This corporation didn't make provisions for return of
88 capital; that is, at the end of their life to be able to redeem stock which was paid in. There was no reserve set up for retiring the capital stock, but was gradually paid out through dividends, so at the end of the life there probably would be nothing to redeem this capital stock. So, under my calculations, about $8,000 of this invested capital remained on January 1, 1917.

Q. In other words, this corporation was returning its capital by way of dividends?

A. Yes, sir.

Q. But hadn't returned all of its capital stock?

A. It couldn't return all of its capital until all the tonnage was exhausted.

The COURT. Could not return all of its capital until all the tonnage had been exhausted?

The WITNESS. Yes, sir.

Cross-examination by Mr. BAILEY:

Q. You figured on the 1st of January, 1917, that it had a capital of about $8,000?

A. Yes, sir; that is, using the tonnages that was given me at that time.

Q. Now, you have examined the books of this company, and there was never paid into the company by the stockholders, or anyone for them, anything except the $25,000, was there?

A. That is all.

Q. That is all that was ever paid in by the stockholders, either in cash or in property?

A. That is all.

Q. As a matter of fact, by October, 1919, there had been paid back by this company to its stockholders more than they ever paid in?

A. Yes, sir; many times more.

Q. I mean October, 1909.

A. Yes.

Q. There had been paid back to the stockholders more than they had paid in, had there not?

A. Well, I don't just recall the date of those dividends.

Mr. Fox. Exhibit E is what you are referring to?

Mr. Bailey. Yes.

The Witness. Exhibit E that is—dividends in excess of $25,000 had been paid up to October 11, 1909.

Q. Before 1913 the stockholders had received some seven or eight times the amount that they ever paid in to the company, had they not?

A. I haven't the figures here, but I don't doubt it.

89 Q. Now, the department has had in effect a regulation along the line to what you testified to known as article 860: "Capital or surplus actually paid in is not required to be reduced because of an impairment of capital in the nature of an operating deficit, except where there has been, directly or indirectly, a liquidation or return of their investment to the stockholders, in which case full effect must be given to any liquidation of the original capital." Now, applying that regulation, the capital had been liquidated long before 1913, hadn't it?

A. No, sir.

Q. Well, they had gotten back seven or eight times as much as they had put in?

A. Yes, sir, from profits.

Q. What was left—they got back—they put in something in exploration of the Perkins lease about $17,000, didn't they?

A. Yes, sir.

Q. When that lease was turned over to the Perkins Mining Company, that exploration expense was all paid back, wasn't it, to the Alworth-Stephens Company?

A. Not as a return of capital.

Q. Just answer my question, will you?

A. Yes, sir.

Q. It was all paid to the Alworth-Stephens Company, so they got that back?

A. Yes, sir.

Q. So if that $17,000 was paid for exploration, of the capital this company had when it started, why it got that back, didn't it—it got that back from the Perkins Mining Company, or from Mr. Lutes?

A. They got back that sum of money equal to that amount; however, it wasn't that identical money.

Q. It was equivalent to the identical money that they put into exploration?

A. It was equivalent to the amount that they had expended.

Q. It was paid back because it was expended?

A. No, I don't know about that.

Q. If it was a fact, if it was a return on what they had put into the exploration, it would make quite a little difference in your calculation?

A. State that again.

Q. I say if it is a fact that that $17,000 and some hundred dollars was paid back to the company because of the exploration expenses that it had had, that would make a difference in the computation which you have made, wouldn't it?

A. It wouldn't.

Q. Why not?

A. Because under my calculation I didn't allow—I didn't allow that return of money which was spent for exploration to wipe off the asset account by a return of that same money.

Q. If you had allowed it, it would make quite a difference?

A. It would have reduced it.

Q. It would have been proper to if it was the return of the
90 investment they had made and if it was paid by the Perkins Mining Company when they took it?

A. No, sir.

Q. Why not?

A. Because that was evidently a bonus for that lease.

Q. It was a bonus for the lease given because they had spent that money in that exploration—if that is all that appears on the books, it would have made a difference in the computation?

A. I am afraid I don't get you.

Q. I am afraid I didn't get you if you can figure $40,000 on the capital stock here——

The COURT. Was this $17,000 taken out of the $25,000?

Mr. BAILEY. They started in and explored and they spent $17,000 in exploration of it.

The COURT. Out of $25,000 that was put in?

Mr. BAILEY. Yes. It is all the money they ever had—$25,000 is all they had.

The COURT. Was that $17,000 spent out of the $25,000 that was originally subscribed by the stockholders according to the books, for exploration?

The WITNESS. Well, there was $21,000 spent in addition to that.

The COURT. $21,000 spent for what?

The WITNESS. For exploration on worthless leases.

The COURT. Did they put in $25,000 and spend that $25,000 plus $17,000 more, is that what you mean?

The WITNESS. I can answer it better by saying what the money was spent for. There might have been some royalties come in at that time, but there was $21,000 spent for worthless leases and $17,868 for these valuable leases, making about $38,000.

The COURT. They put in $25,000?

The WITNESS. Yes.

The COURT. They actually spent $21,000 for some exploration on land that turned out to be worthless, is that right?

The WITNESS. Yes, sir.

The COURT. And then they spent $17,000 above that on these that turned out to be worth something?

The WITNESS. Yes, sir.

91 The COURT. And that made a total expenditure of $38,000 for exploration; is that right?

The WITNESS. Yes, sir.

Mr. WASHBURN. Your Honor has not got it quite right. As a matter of fact, the $25,000 was paid in, as the exhibit in evidence shows, by instalments with the exploration. The Perkins mine was the first exploration we made, if I remember correctly, and that is where we got this ore. We made a sublease, and they returned to us $17,868.50 that we spent on that property.

The COURT. How do you make the $21,000?

Mr. WASHBURN. Then we proceeded with further explorations and spent some more, to wit: We spent some of this $17,000 we got back from the Perkins.

The COURT. Go on. You can ask the witness.

Mr. WASHBURN. There is an exhibit that shows every cent we got and when we got it.

Mr. FOX. Do those exhibits show invested capital?

Mr. WASHBURN. It doesn't make any difference.

The COURT. What I want to get at is the facts. He testifies up to the present time that this company spent $17,000 in explorations that turned out to be valuable.

The WITNESS. Yes.

The COURT. And spent $21,000 in other explorations that turned out to be worth nothing.

The WITNESS. Yes, sir.

The COURT. According to you that makes $38,000 of invested capital?

The WITNESS. Yes, sir.

The COURT. Because that was put into the exploration of the company?

The WITNESS. Yes, sir.

Q. Now, if the $17,000 that was spent on the Perkins was actually paid back as and for those explorations and was again put into other explorations that turned out valueless, that, in your judgment, would

reduce the invested capital to which you have testified to the extent of $17,000 or $17,000 and some hundred dollars?

A. No, sir; I don't think it would.

92 Q. You are figuring that $17,000 twice, then?

A. It was turned over and reinvested, which would double your investment account.

Q. If that should be deducted from the $39,000 or $40,000 that you have stated as invested capital, why, then, on your method of figuring on the 1st of January, 1917, you would have about half the $8,000 that you testified still left as the invested capital?

A. I should say so.

Q. In other words, about $4,000, or something like that. Now, on the department ruling all of the royalties that this company received during 1917 were income, were they not?

A. I believe that they were taxed that way—I wouldn't like to state——

Q. You attended to these matters right along—you know how they figured?

A. If the leasehold cost anything, there would be a little taken off.

Q. I am talking about this case—all of them that are considered royalties are income and are considered so by the department?

A. Yes.

Q. All of the royalties that were received thereafter would likewise be considered income?

A. Yes, sir.

Q. And so there wasn't any time after January, 1917, when this company had any property out of which it could get back any part of its capital, or invested capital, if it then had any, was there?

A. Why, I understood it didn't run out until 1918.

Q. But I say it didn't have anything except these leases from 1917 on, did it?

A. That is all.

Q. If all that it got out of this was on the department's theory income, then it had no way of getting back invested capital?

A. I can't testify to that; it might not necessarily be income in this case. In this case we found a cost that wouldn't be income.

Q. You are making it an assessment—you stated it was income—you think the one that made these assessments didn't do it right—I mean the member of the department didn't do it right?

A. If whoever made the assessment didn't allow for this $39,000 that I have made invested capital, allowed returns, the net income isn't right.

Q. You think they should have considered that $8,000 still left?

A. Yes, sir.

Q. It should have been considered?

A. It should have been considered as a return of capital.

Q. You think all of the rest, so-called, had not been returned prior to January 1, 1917?

A. Yes.

93 Q. But this $17,000 wasn't properly figured as invested capital—it would only be about $4,000 that they had in 1917?

A. Yes.

Q. I understood you to say you figured the invested capital on the basis of what money the company spent; that is, the expenditures that it made?

A. The investment expenditures?

Q. Yes.

A. Yes, sir; but not an expense expenditure.

Q. You do not pay any attention, then, to whether they got back that investment expenditure or not?

A. In what way?

Q. Why, as a bonus—when this lease was turned over that they got back from the Perkins Mining Company, you do not figure that that cuts any figure?

A. That would be an income account.

Q. Well, just tell me, if you will, why this income account, when they put in the $17,000 out of the money that was paid in by the stockholders into the exploration, then when that exploration is completed they sell that very lease and the lessee pays them back the $17,000 which they have expended for exploration, will you tell me why that is income and not a return on the capital that this company had?

A. Because their costs at $17,898 was returnable to them to the tonnage that they had.

Q. They got it in cash, as I understand it?

A. That was bonus.

Q. If they got it in cash, why, then, my contention would be right, wouldn't it, that it was a return of capital?

A. No, sir.

Q. No?

A. No, sir.

Q. Well, you understood that they got a return of tonnage or royalty, did you?

A. I started to explain when this was expended, the $17,000 was expended, that that was an asset account to the Alworth-Stephens Company which extended as long as there was tonnage to be mined. It couldn't be wiped off by getting that same amount back.

The COURT. In other words, the corporation doesn't wipe out its investment of dividends even if it pays the investment forty times?

The WITNESS. Yes.

Mr. BAILEY. It isn't a question of dividends; they put $17,000 into holes on the Perkins property and they turn that lease over and that $17,000 is paid back by the Perkins Mining Company to

94 return that very investment. Now, he adds that on twice in figuring that that is the capital. That is what I can't understand.

Mr. WASHBURN. Never mind that.

The COURT. I think I know what this gentleman means. If they put that $17,000 into some valuable lease—into some property that had turned out to be valuable property, his contention is that no matter how that comes back that is still invested capital of the company. That is what he means. I don't care how it comes back, bonus or dividend, or how. That is what you mean?

The WITNESS. Yes, sir.

The COURT. It stays in there as invested capital as long as there is any ore in the mine?

The WITNESS. Yes, sir. It comes out as the tonnage comes out; that $17,000 is spread over two million tons—when a million ton is out half of the $17,000 is out.

The COURT. It is never completely exhausted until all the tonnage is out?

The WITNESS. Yes, sir. I might give an illustration that would illustrate it better. Suppose you spend $40,000 for an office building, which be an investment, and the next week you should seel one room for $40,000. Youl could not wipe off that investment by a credit of $40,000 for that room account.

The COURT. Now matter how you get it back, as long as you have got money into that particular property, as long as you have got part of that particular property that you acquired, you have got that much invested?

The WITNESS. Yes, sir.

Mr. WASHBURN. You said something about the capital finally be reduced through dividends to something like $8,000 in your testimony a little while ago?

The WITNESS. Yes, sir.

Mr. WASHBURN. That reduction was made from your figure as to what you considered the invested capital by reason of the fact that the company had distributed so-called dividends to its stockholders that operated to reduce that invested capital?

The COURT. No; the reduction of ore in the mine operated to reduce it. That is what he said.

95 The WITNESS. And that paid out as dividends reduces the capital.

The COURT. The reduction of the ore in the mine would reduce it?

The WITNESS. The ore of the mine converted into cash and the cash paid out creates a reduction of the capital.

The COURT. But your contention is that as long as there is any ore left in that mine you have still some invested capital in it?

The WITNESS. Yes.

Mr. WASHBURN. Well, does the fact that something like $17,000 was first expended by the company on the Perkins mine before this lease was sold to it, or the sublease of the property made, does that make a difference, in your mind, between the Perkins property and the Hudson property, on which no expenditure was made by this

ompany, but the exploration expenditures were made by the Hudson eople. Does the fact that the company spent $17,000 on the Perkins roperty make a difference in your mind with reference to invested apital in these two properties?

The WITNESS. If there is nothing expended on the other property, here would be no investment.

Mr. WASHBURN. That is, there was no invested capital of this com- any in the Hudson mine, as I understand it?

The WITNESS. If there was nothing spent; no.

Mr. WASHBURN. Now, then, having spent $17,000 on the Perkins ine and the Perkins people paying that money back to this com- any, how was there left any invested capital in that mine any more an there was in the Hudson mine?

Mr. FOX. Before you answer that—it seems that the line of ques- oning is intended to separate the properties of this corporation into arious parts and parcels. Invested capital of a company must be ken as a whole, and I don't think that these questions are material to this part of the property and that part of the property any ore than it would be to the rooms in an office building. The cor- oration was organized to engage in mining leases, and it had in- sted capital in one parcel and some in another, but that doesn't ke away the fact that the corporation was organized and using invested capital.

(Last question read.) A. Because you can't wipe off an investment account by returns of income.

Mr. WASHBURN. You want to call this coming back of this money come and not call it as a return of capital invested?

The WITNESS. Yes, sir.

The COURT. How about that other $21,000—that was practically rown away, was it?

The WITNESS. Yes, sir; but that remained a cost of finding val- ble property; that would be exploration costs.

The COURT. You mean that $21,000 must be considered in what s gone into both the Hudson and Perkins mine?

The WITNESS. Yes, sir.

The COURT. With this whole expenditure, the $17,000 and $21,000. that right?

The WITNESS. That is right.

Mr. WASHBURN. But supposing the money that was expended in e Perkins mine was paid back and these expenditures that were de, this $21,000 that you speak of, were made afterwards, would u still charge it up as a part of the expenses for hunting for the rkins mine?

Mr. FOX. Paid back to whom—to the corporation or stockholders?

Mr. WASHBURN. Paid back to the corporation. I am asking him he would still charge the additional $21,000 that you say was spent drilling property and it turned out to be worthless, would you ll charge that as a part of the expense of getting the Perkins and dson mines?

The WITNESS. I think under that condition that would be a matter of choice; the reason why I charged this other to what you call the capital account was because there was no income to charge them against. We wouldn't want to charge costs against capital; however, after it was a going concern and you would dig here or there and make a failure, that could be charged against an income account as a loss, but a corporation starting out on a venture when they didn't know whether they were going to spend $25,000 or $100,000 they would naturally want to not charge it against capital or income, but to set it up to find their total cost——

97 Mr. WASHBURN. You figure that you cannot apply any of the moneys that was returned to the stockholders as a return of capital as long as there is any ore in the mine?

The WITNESS. I don't believe I just follow you.

Mr. WASHBURN. I understood you to say that you didn't apply any moneys that were paid back, or paid through, we will say, distribution or dividends by the corporation to its stockholders, as wiping out invested capital as long as there was any ore left yet in the mine. Did I understand you correctly?

The WITNESS. That depends upon whether a provision has been made by the corporation for retiring the stock. In this case no provision was made; as the dividend was declared, a small part of it must have been some capital.

Mr. WASHBURN. Your view is that in order to diminish invested capital the stock would have had to be surrendered in part?

The WITNESS. To diminish the capital?

Mr. WASHBURN. Yes.

The WITNESS. No, sir. To keep it intact the provision would have to be made.

Mr. WASHBURN. Is it a point in your computing of this thing that the company has distributed down to where it hasn't $25,000 of funds left to pay out to its stockholders to surrender the stock and cancel it?

The WITNESS. I only went up to '17; at that time no provision had been made for it; there may be a reserve now, but I don't know.

Mr. WASHBURN. I think I have no more questions, Mr. Bailey.

By Mr. BAILEY:

Q. Let me put this illustration to you: Suppose the only transaction that this company ever had was first the paying in of the $25,000 of capital stock, that then they had to explore the Perkins property and put $17,000 of that money into exploration——

The COURT. Of that $25,000?

Q. Of the $25,000—that then instead of making a sublease to the Perkins Mining Company they simply assigned their rights in

98 that property to the Perkins Mining Company for $17,000 and gotten that money—suppose that is all the transaction the company ever had—how many times would you figure that that $17,000 represented invested capital—once or twice? How much invested capital did this company have?

A. $25,000.

Q. Not $42,000 or something like that?

A. $25,000.

Q. You wouldn't figure in part of that $17,000 twice?

A. Not if I follow you correctly—that the $17,000 was expended——

Q. Out of the $25,000—then they sold that property for $17,000 and it ended all relation to it.

The COURT. Then they would have their $25,000 back?

Q. Let us go one step farther away. Suppose that they then used that $17,000 again in exploring some other property that turned out a failure, how much invested capital would they then have?

A. You mean according to regulations or according to actual investment?

Q. According to your idea?

A. Under the regulations, $25,000.

Q. They still would have $25,000 only, although they used that $17,000 twice in explorations?

A. Yes, sir.

Q. They still would only have $25,000?

A. Because the stockholders would still have their $25,000 in that company: the actual money isn't there, but their investment is still in it.

Q. I take it if you had found in the records of this company that by a formal resolution in October, 1909, we will say, they had resolved to return to the stockholders the amounts which they had paid in as a return of their capital, that then there would have been no invested capital so far as that $25,000 was concerned, thereafter?

A. I don't think there would have been any question about it in cases of that kind, where it had been paid in with the understanding that what they paid for stock would be returned not as a dividend but as a subscription.

Q. Suppose in 1909 there had been a resolution that the stockholders should then be returned their $25,000 for their capital invested, and that payment had been made to them, then the company from that time on wouldn't have had any invested capital so far as the $25,000 was concerned, would it?

Mr. FOX. I don't see how that is pertinent. We have got the facts in this case.

The COURT. That is to test the theory of the accountant?

Mr. BAILEY. Yes.

The COURT. Go ahead.

A. I don't think if in the year 1909 in this particular case $25,000 had been returned that that would have been necessarily a return of capital.

Q. I say it would have been so treated and you would so treat it; that it was a return of capital and entered on the corporate books and the money paid under that resolution?

A. I have to think quite hard to see if—we have so many regulations—that couldn't happen if there was a surplus account.

Q. I am limiting my question to the $25,000. I say from that time on so far as the $25,000 of invested capital was returned that would be wiped out by that transaction; you could thereafter figure the original $25,000 as a part of the original capital, could you, if it was paid back as the capital paid in?

Mr. Fox. And the stock retired?

Q. Supposing that that had been done?

A. You will have to make that a little plainer for me to answer that. Where did the money come from and what money was paid back?

Q. If you will follow very carefully my question I think you will see it as plain as I can make it. Suppose in October, 1909, the stockholders of this company had passed a resolution that out of its funds there should be paid to the stockholders a return of the capital which they had paid in and that that payment had then been made, my question is, if thereafter you would, in figuring as invested capital from that time on, you would consider as part of the invested capital the original $25,000?

The Court. Of the corporation—would the corporation still have that invested capital?

Mr. Bailey. That is the question. I cannot make it any plainer.

A. Give me a few minutes to think on that. I don't think that would reduce the invested capital.

The Court. You don't think so?

The Witness. No; because at that time that had been expended for these assets.

The Court. It does not make any difference what you call
100 it, it does not wipe out the original investment in the corporation; is that the idea?

The Witness. That is the idea.

Redirect examination by Mr. Fox:

Q. Now, getting back to the facts in this case and what is shown by the books of the corporation, in your opinion, they received $17,000 or they had $17,000 as an asset, didn't they?

A. Yes.

Q. That was money expended in exploration?

A. Yes.

Q. On the books they wiped that asset out; is that correct?

A. That is correct.

Q. Is that good accounting practice?

A. It is not.

Q. Why?

A. Because under that condition no corporation could very long have an asset account.

The Court. If it had made any money it would wipe out its capital stock right away?

The WITNESS. Yes.

Q. As a matter of fact, under that theory every corporation that was earning money would have no invested capital as long as it had distributed it; is that correct?

A. That is correct.

Q. Then, under the system of bookkeeping employed by the plaintiff, they have wiped off an asset and by that method attempted to return so much of what was their invested capital?

A. Yes, sir.

Q. In computing invested capital of corporations is it the practice either of accountants, or in the bureau, to separate various properties of a corporation; or is the invested capital figured as a whole in the whole business?

A. In calculating the invested capital of a corporation we usually don't go to the asset side of a balance sheet; we don't care what it is invested in; we check the capital and surplus which represents all as assets—it may be in cash, leaseholds, equipment; it makes no difference—it is reflected in the liability of the balance sheet under capital and surplus.

Q. That is what you look to for the invested capital?

A. Yes.

Q. Under proper methods of accounting where should this item of $17,000 be placed?

A. Call it the Perkins lease or Hudson lease, or leasehold.

101 Q. They should have used it as an asset?

A. Used it as an asset.

Q. Then as another entry what would have been a proper entry?

A. It would be the capital account or surplus, or capital and surplus.

Q. In order to make your balance sheet?

A. Yes.

Mr. WASHBURN. As a matter of fact, what did they charge—did they charge up to each property where they drilled, for instance, the expenditure in this Perkins, charge up that $17,000, the different items and then they credited back to that property what was paid on?

The WITNESS. Yes.

Mr. WASHBURN. That is the way they kept it?

The WITNESS. Yes.

Mr. WASHBURN. Charged the expenditure against each property and the expenditures were charged on those books by the number of holes?

The WITNESS. Yes, sir.

Mr. WASHBURN. A description of where the whole was put and then, as in the Perkins case, they credited back the amount?

The WITNESS. Yes. sir.

The COURT. Had they spent $38,000 in all of those holes?

The WITNESS. Yes, sir.

The COURT. Those were exploration holes?

The WITNESS. Yes, sir; on all the property.

By Mr. JAQUES:

Q. I want to ask you, you make a distinction between the earnings of the corporation and its invested capital, don't you?

A. Yes, sir.

Q. Now, if the company after it started doing business, instead of paying earnings out to its stockholders, invested the earnings, that would constitute an increase in the invested capital, wouldn't it?

A. Well, it wouldn't make any difference whether it had been invested, or not, so long as it remained with the corporation, either in cash or other assets.

Q. Or invested in something else?

A. Or invested in something else.

102 Q. When they invested this $17,000 in the Perkins mine, plus, that constituted a capital investment?

A. Yes, sir.

Q. When they negotiated the lease they received in addition to the royalties and rents provided for in the lease an equivalent amount, and that according to your theory is an income or profit from that investment?

A. Yes, sir.

Q. And the fact that they received it could in no way wipe it out as an increase in their capital investment?

A. No, sir.

Q. The COURT. In other words, the getting back of it didn't wipe out the investment.

Mr. JAQUES. Yes.

Q. In paying dividends counsel asked you something about the difference in the caiptal, saying it was $8,000 in 1917. Properly speaking——

The COURT. He said decrease in invested capital.

Q. How do you arrive at that reduction—that is to say, if a dividend was paid out of the earnings, or if there was something added to it besides earnings—is that the way you have arrived at it?

The COURT. The property that the $25,000, or the $17,000 has gone into is being diminished in value all the time, that is what you mean, isn't it?

The WITNESS. Yes.

The COURT. Suppose you paid $17,000 or $25,000 for a piece of property that turns out to be worth a million dollars. Now, you have got, at least, a part of that $25,000 in there until it is all gone. Your investment has not been wiped out until it is all gone—it would be a proportionate part of that $25,000 that the amount left was to the full amount that you started with?

The WITNESS. Yes, sir.

The COURT. That is your theory?

The WITNESS. Yes, sir.

Q. That is your answer?
A. Yes, sir.
The COURT. I see it, too. I see a very good basis for it.

Recross-examination by Mr. BAILEY:

Q. Is there any way under the department's holdings, or rul-
103 ings, to reduce any invested capital after it is once invested so far as this income tax is concerned—is there any way to get it off—getting it off the books—what I would like to know is whether there is any other way where, for instance, if the company starts out with a certain amount of capital stock which is paid in at par and then we will say adds on in some way or the other a surplus, is there any way to get off that surplus and reduce the invested capital, that is, by a resolution, paying it to the stockholders, or anything of that sort?

A. If a dividend is paid in excess of the actual real surplus of the corporation, it is a reduction of capital.

Q. Where does it come from in order to reduce the invested capital?

The COURT. Because they have paid out to the stockholders more than there is surplus over the capital stock.

The WITNESS. Yes, sir. That is a very common occurrence down there—that is done.

The COURT. When you get capital invested in a piece of property once, as long as you own that property you have got some investment in there. That is what he means?

The WITNESS. Yes, sir.

The COURT. As long as you own that property you have got some investment in it. He illustrates it very fully by one room in a building being rented for enough the first year to pay for the cost of the building, and then still you have got it invested there.

(Witness excused.)

In rebuttal:

J. L. WASHBURN, recalled as a witness on behalf of the plaintiff, testified as follows:

Mr. WASHBURN. I simply want to say in the line of explanation the same as the witness before me has testified in explanation of his theory. I haven't kept these books, and I am not a bookkeeper, but we in this company have not considered that we had an investment in these properties since 1909, and the only reason we did not call in the capital stock was, it was held by these people, and their employees have simply left it out as a matter for convenience
104 for division of the money. We took no other business. I can make no other explanation of it than that.

(Witness excused.)

The COURT. Plaintiff rests.

(Adjournment taken until ten a. m., June 7, 1921.)

Morning session, June 7, 1921

Mr. BAILEY. I would like to ask to open up the case just to put in one paper that I overlooked yesterday.

The COURT. Yes.

Mr. BAILEY. I would like to call upon you—I do not know what you call it, hardly, but it is the statement with reference to this refund that was gotten up by Mr. Talbert and approved by Mr. Calahan and sent to the department.

Mr. FOX. I don't know as I have got it; is that the certified copy that went in?

Mr. BAILEY. I don't think so. I served notice on you to produce it.

Mr. FOX. Do you know the date of it?

Mr. BAILEY. Well, it was in October, 1919, it was gotten up; it is a statement recommending the refund.

Mr. FOX. Addressed to the Alworth-Stephens Company?

Mr. BAILEY. I can't tell you who it was addressed to. They told me what was in it.

Mr. FOX. Well, we can't produce those; if it is correspondence or something that is communicated to your company, we can put it in, but we can't disclose the inside workings of the department there.

Mr. BAILEY. I don't know how much inside it is—I suppose these tax matters.

Mr. FOX. The court will have to rule on that.

Mr. BAILEY. I think we are entitled to it. This was in connection with the application for refund. I spent practically a week in the department in October, 1919, in going over the matter with at least a dozen heads of the divisions and finally took it up with Mr. Roper, who referred me to Mr. Talbert, and both of them said they thought we were entitled to a depletion and that it might involve a
105 modification of the regulations, and Mr. Talbert got up an approval of the application for refund, which they stated to me was upon the exact basis of what we are now using and signed it and had it approved by Mr. Calahan. It was sent by them over to Mr. Miller, the solicitor of the department, and I had quite a consultation with Mr. Miller over it, and he asked me to write a brief in reference to the matter when I came home, which I did and sent to him. I was advised it was turned down, but the approval of the application——

Mr. FOX. I claim it wasn't approved, because under the law the solicitor of internal revenue must approve the allegations of the claimants for refund. They must go to the solicitor, who says yes or no. If he says no, it is turned down and goes back to the records of the department.

The COURT. Have you got the papers?

Mr. BAILEY. No; I haven't got the papers, but we have served notice to produce them.

The COURT. Have you got the papers?

Mr. Fox. No; I don't believe—they would go back to the dead files on rejection. I am sure we are not permitted to introduce that.

The Court. I don't know as they have any effect in this case, because the matter is up to me.

Mr. Fox. This is inside the department. Your honor can say whether or not the plaintiffs are entitled to recover in this case in your interpretation of the law.

The Court. It is all up to me; I can not escape the responsibility.

Mr. Jaques. They sent me all the letters referred to there.

Mr. Bailey. I am very certain that I talked to Judge Jaques about it.

Mr. Fox. That wouldn't go out of the department; I know that.

The Court. Go on and state what you want.

Mr. Bailey. Well, I am calling for the papers.

The Court. I understand; he says he hasn't got it.

Mr. Jaques. I never saw it; they didn't send it to me.

The Court. There was a lot of correspondence submitted here yesterday. I do not know what it was.

106 Mr. Fox. That was all the correspondence between the department and the taxpayer—what the department did inside, its conferences between the chief and the rest is not pertinent to this case.

Mr. Bailey. I called for all correspondence and memoranda out of the department.

The Court. Well, Mr. Bailey, your statement would have just as much influence with me as that letter.

(Correspondence marked for the purpose of identification as "Plaintiff's Exhibits 4 to 13," inclusive.)

(Testimony closed.)

STIPULATION APPROVING BILL OF EXCEPTIONS

It is hereby stipulated by and between the parties to the above entitled cause that the above bill of exceptions proposed by the defendant and the above settled case or record proposed by the defendant may be allowed and signed by the judge of said court as and for the bill of exceptions and settled case in said action, and may be filed as the bill of exceptions of the defendant in said action and the settled record or case in said action.

Dated September 9th, 1922.

Washburn, Bailey & Mitchell,
Attorneys for Plaintiff.

Lafayette French, Jr.,
U. S. Attorney and Attorney for Defendant.

In United States District Court

Order settling bill of exceptions

The foregoing document having been examined and having been found to contain a full, correct, and complete statement of the pro-

ceedings had at the trial of the above action, including all the evidence, rulings, and exceptions therein, and a stipulation as to the exhibits used in the trial of said cause.

It is hereby allowed and signed as the bill of exceptions
107 of the defendant in said action and as the settled record of the proceedings in said cause.

Dated this 13th day of September, 1922.

WILBUR F. BOOTH, *Judge.*
By request of PAGE MORRIS, *Judge.*

In United States District Court

Stipulation re transmission of original exhibits to Circuit Court of Appeals and order thereon

Filed September 13, 1922

It is hereby stipulated and agreed by and between the parties to the above-entitled action that as part of the record upon which said action may be heard and determined in the Circuit Court of Appeals, Eighth Circuit, the clerk of said District Court may certify and transmit to said Circuit Court of Appeals the original exhibits herein listed below, to wit:

Plaintiff's Exhibit 1: Stipulation of facts; also copies of mining contracts, leases, etc.

Plaintiff's Exhibit 2: Income tax return of Alworth Stephens Company for the year '17, '18, and '19 and claims for refund.

Plaintiff's Exhibit 3: Statement of iron ore shipped from Hudson and Perkins mines from 1913 to 1919.

Plaintiff's Exhibit 4: Letter from Treasury Department, U. S., to Alworth-Stephens Company.

Plaintiff's Exhibit 5: Letter from Department of Justice to W. D. Bailey and correspondence from W. D. Bailey to Department of Justice.

Plaintiff's Exhibit 6: Letter from Treasury Department, U. S., to Alworth Stephens Company and copy.

Plaintiff's Exhibit 7: Letters from Treasury Department, U. S., to Alworth-Stephens Company and copy.

Plaintiff's Exhibit 8: Letter from Treasury Department, U. S., to Alworth-Stephens Company.

Plaintiff's Exhibit 9: Letter from Treasury Department, U. S., to Alworth-Stephens Company.

Plaintiff's Exhibit 10: Letter from Alworth-Stephens Company to internal revenue collector.

108 Plaintiff's Exhibit 11: Letter from Treasury Department, U. S., to Alworth-Stephens Company.

Plaintiff's Exhibit 12: Letter and reply from Treasury Department, U. S., to Alworth-Stephens Company.

Plaintiff's Exhibit 13: Letter from U. S. Treasury Department to Alworth-Stephens Company and reply.

Defendant's Exhibit AA: Copies of corporation income tax re-
ns for the years 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916.
Defendant's Exhibit BB: Certificate of N. A. Nelson, secretary of
nnesota Tax Commission, certifying that statement attached is a
e and correct record of shipments from Hudson & Perkins mines.
Defendant's Exhibit CC: Statement of shipment of tonnages
m Perkins mine from May 1, 1913, to May 1, 1914.
The foregoing exhibits were offered and received in evidence
on the trial of said case, and it is hereby further stipulated that
e same when so certified and transmitted may be considered as
l being a part of the record herein for all the purposes and use
the hearing and decision in said case upon the writs of error
rein; that the object of this stipulation is to avoid what is deemed
the parties hereto to be the unnecessary expense of incorporating
l exhibits in the printed record.

WASHBURN, BAILEY & MITCHELL,
Attorneys for Plaintiff.
LAFAYETTE FRENCH, JR.,
U. S. Attorney and Attorney for Defendant.

Upon reading the foregoing and attached stipulation of counsel
l upon motion of Lafayette French, jr., United States attorney
d attorney for defendant.
It is ordered that in addition to the transcript of the record on
peal in this action that the clerk of this court transmit to the
rk of the United States Circuit Court of Appeals at St. Louis,
Missouri, the following exhibits in this action, to be by him
safely kept and returned to this court upon the final deter-
mination of this action in said Court of Appeals, to wit:
Plaintiff's Exhibit 1: Stipulation of facts; also copies of mining
ntracts, leases, etc.
Plaintiff's Exhibit 2: Income-tax return of Alworth-Stephens
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internal revenue collector.

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Defendant's Exhibit BB: Certificate of N. A. Nelson, secretary of Minnesota Tax Commission, certifying that statement attached is a true and correct record of shipments from Hudson & Perkins mines.

Defendant's Exhibit CC: Statement of shipment of tonnages from Perkins mine from May 1, 1913, to May 1, 1914. Dated this 29th day of August, 1922.

110

PAGE MORRIS, *Judge*.

In United States District Court

Assignment of errors

Filed September 13, 1922

[File endorsement omitted.]

And now comes Margaret C. Lynch, executrix, etc., the defendant, and makes and files this her assignment of errors:

First. The District Court of the United States for the District of Minnesota erred in allowing the plaintiff lessee sublessor a deduction, from its gross income in computing its Federal taxes, for depletion on the March 1, 1913, value of its interest in certain mineral leasehold rights held by it on that date.

Second. The District Court of the United States for the District of Minnesota erred in refusing to find as a conclusion of law, as requested so to do by the defendant, that the Minnesota mining leases involved in this case were not a sale of property, nor a sale of the ore in place, and the moneys paid by the holders of the subleases to Alworth-Stephens Company were not converted capital but rents or royalties.

Third. The District Court of the United States for the District of Minnesota erred in refusing to find as a conclusion of law, as requested so to do by the defendant, that the plaintiff in this case was both a lessee and a lessor, but that it was not a fee owner of any part of the land nor of the ore in place therein, and therefore, under the revenue act of 1916 the nature of the interest held by Alworth-Stephens Company was not such as to permit it to claim a deduction for depletion; but on the contrary the contingencies which attended the character of the plaintiff's interest barred it from claiming that its capital assets had been diminished.

Fourth. The District Court of the United States for the District of Minnesota erred in refusing to find as a conclusion of law, as re-

quested so to do by the defendant, that the royalties received by the fee owners was income to them (the fee owners), and the additional royalties which the Alworth-Stephens Company received by reason of its subleases, etc., was likewise income to it (Alworth-
111 Stephens Company); and that the statutory deduction for depletion cannot be credited twice—once to the fee owners and again to the lessee; that such a deduction for depletion belonged of right to the fee owners and the Alworth-Stephens Company was not entitled to the deduction for depletion.

Fifth. The District Court of the United States for the District of Minnesota erred in refusing to find as a conclusion of law, as requested so to do by the defendant, that since the terms of the leases in question do not constitute a sale of the property nor of the ore in place, and since the lessee (Alworth-Stephens Company) is not entitled to a deduction for depletion under the provisions of section 12 (a) of the revenue act of 1916, the question of value as of March 1, 1913, of the ore in place becomes immaterial so far as the lessee (Alworth-Stephens Company) is concerned; that the net income of the plaintiff was therefore properly stated in its original income tax return as $77,505.98, and the assessment of the tax upon that amount, which assessment did not include a deduction for depletion, was correct.

Sixth. The District Court of the United States for the District of Minnesota erred in refusing to find as a conclusion of law, as requested so to do by the defendant, that under the facts as found in this case the assessment should properly be made by disallowing a deduction for depletion to Alworth-Stephens Company, and by then determining the amount of the tax to be paid by considering the plaintiff as a corporation having an invested capital of $25,000.00.

Seventh. The District Court of the United States for the District of Minnesota erred in concluding that the sum of $10,253.21, which was paid on the 10th of June, 1918, by plaintiff to defendant's testator as Federal taxes for the year 1917, was the full amount due from plaintiff for taxes for said year.

Eighth. The District Court of the Unites States for the District of Minnesota erred in concluding that the defendant's testator, as collector of internal revenue for the district of Minnesota, made a wrongful demand upon the plaintiff for the payment of an additional tax of $17,128.44, and that the plaintiff paid the said sum of $17,128.44 as taxes pursuant to a wrongful demand of defendant's testator.

Ninth. The District Court of the United States for the District of Minnesota erred in concluding that the sum of $17,128.44, paid by plaintiff to defendant's testator as excess profits taxes for the year 1917, was erroneously extracted from the plaintiff by defendant's testator.

112 Tenth. The District Court of the United States for the District of Minnesota erred in concluding that the plaintiff was required to and did pay internal revenue taxes for the year 1917 in

excess of the amount which it was lawfully required to pay, to wit, in the sum of $17,128.44.

Eleventh. The District Court of the United States for the District of Minnesota erred in concluding that the net taxable income of the plaintiff for the year 1917 was in the amount of $21,779.18.

Twelfth. The District Court of the United States for the District of Minnesota erred in concluding that the income tax on the net income of the plaintiff for the year 1917 was $735.70 and the war and excess profits tax on its said net income for the said year 1917 was $9,517.51 and that the total income and excess and war profits tax of the plaintiff on its net income for the year 1917 was in the amount of $10,253.21.

Thirteenth. The District Court of the United States for the District of Minnesota erred in concluding that the plaintiff is entitled to have and recover of and from the defendant the sum of $17,128.44, with interest thereon from the 21st day of February, 1919, at the rate of one-half of one per cent per month, together with the costs and disbursements of this action.

Fourteenth. The District Court of the United States for the District of Minnesota erred in rendering judgment for the plaintiff in the sum of $17,128.44 with interest from the 21st day of February, 1919, at the rate of one-half of one per cent per month, and for costs.

Fifteenth. The District Court of the United States for the District of Minnesota erred in not entering judgment for the defendant in this cause.

Wherefore, Margaret C. Lynch, executrix, etc., the defendant, prays that said judgment by the United States District Court for the District of Minnesota be reversed, and that the said court be instructed to enter a judgment for the defendant.

LAFAYETTE FRENCH, Jr.,
United States Attorney.

113 In United States District Court

Petition for and order allowing writ of error

Filed September 13, 1922

[File endorsement omitted.]

To the Honorable District Court of the United States, District of Minnesota, Fifth Division:

The defendant in the above-entitled action, feeling herself aggrieved by the judgment rendered and entered in the above-entitled action on the 30th day of March, A. D. 1922, comes now, by her attorney, and petitions the honorable court for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit of the United States, according to the laws of the United States in that behalf made and provided; and also your petitioner prays that a transcript of all the

proceedings in this cause, together with the assignments of error filed herein, be duly authenticated and that the same be sent to the Circuit Court of Appeals.

LAFAYETTE FRENCH, Jr.,
United States Attorney and Attorney for the Defendant.

Upon motion of Lafayette French, jr., United States attorney and attorney for the defendant in the above-entitled cause, and upon the filing of the foregoing petition for a writ of error, and upon the filing of the assignments of error herein,

It is by the court hereby ordered, that the writ of error be, and the same is hereby, allowed, to have reviewed in the United States Circuit Court of Appeals for the Eighth Circuit, the said judgment entered herein on March 30, A. D. 1922.

It is further ordered, that all further proceedings in this court be suspended and stayed until the determination of said writ of error.

Dated this 13th day of September, A. D. 1922.

WILBUR F. BOOTH,
District Judge.
By request of PAGE MORRIS, *Judge.*

114 In United States District Court

Præcipe for transcript of record

Filed September 13, 1922

[Filed endorsement omitted.]

To JOEL M. DICKEY,
Clerk of said Court:

In the above-entitled cause please make and forward to the clerk of the United States Circuit Court of Appeals, Eighth Circuit, at St. Louis, Missouri, as and for a transcript of the record on the writ of error from said Circuit Court of Appeals, copies of the following papers:

Complaint, summons, stipulation, and order making Margaret C. Lynch, executrix of the last will and testament of E. J. Lynch, deceased, a party defendant, answer, reply, if any, stipulation waiving jury, stipulation as to facts, judgment for plaintiff, bill of exceptions, assignments of error and prayer for reversal, petition for writ of error and order allowing the same, and this præcipe and election.

The defendant herein files this, her notice of election, to take and file said transcript in said Circuit Court of Appeals, and that the same be printed under the supervision of the clerk of said Circuit Court of Appeals, under its rules.

LAFAYETTE FRENCH, Jr.,
United States Attorney and Attorney for the Defendant.

[Citation in usual form showing service on Washburn, Bailey & Mitchell filed Sept. 18, 1922, omitted in printing.]

115 In United States District Court

Writ of error and return

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the District of Minnesota, Fifth Division, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you at the January term, 1922, thereof between Alworth-Stephens Company, plaintiff, and Margaret C. Lynch, executrix of the last will and testament of the estate of E. J. Lynch, deceased, substituted as defendant in the place of said E. J. Lynch as collector of internal revenue for the district of Minnesota, deceased, a manifest
116 error hath happened to the great damage of the said defendant Margaret C. Lynch, executrix of the last will and testament and of the estate of E. J. Lynch, deceased, substituted in the place of said E. J. Lynch as collector of internal revenue for the district of Minnesota, deceased, as by her complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if justice be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit on or before the 13th day of November, 1922, to the end that the record and proceedings aforesaid being inspected the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States should be done.

Witness the honorable William H. Taft, Chief Justice of the Supreme Court of the United States, this 13th day of September, A. D. 1922. Issued in my office in Duluth, Minnesota, with the seal of the District Court of the United States for the District of Minnesota.

JOEL M. DICKEY,
Clerk of the District Court of the United States of America for the District of Minnesota.
By J. C. HERMAN ENGEL,
Deputy.

Allowed by PAGE MORRIS, *Judge.*

(Seal of U. S. Dist. Court, District of Minnesota, Fifth Division.)

UNITED STATES OF AMERICA,
District of Minnesota, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the
117 Eighth Circuit a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of the United States District Court, District of Minnesota, Fifth Division, at Duluth, in said district, this 4th day of November, A. D. 1922.

JOEL M. DICKEY, *Clerk.*
Clerk of the District Court of the United States of America for District of Minnesota.
By E. CATHERINE NEFF,
Deputy.

(Seal of U. S. District Court, District of Minnesota, Fifth Division.)

In United States District Court

Clerk's certificate

Filed November 9, 1922

UNITED STATES OF AMERICA,
District of Minnesota, Fifth Division, ss:

I, Joel M. Dickey, clerk of the District Court of the United States for the District of Minnesota, do hereby certify and return to the honorable the United States Circuit Court of Appeals for the Eighth Circuit that the foregoing, consisting of 165 pages, numbered consecutively from 1 to 165, is a true and complete transcript of all the records, process, pleadings and judgment, and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said court, in accordance with a praecipe for such transcript, a copy of which is included within said paging; and I do further certify that I have annexed to said transcript and included within said paging the original citation, together with the admission of service thereon.

In witness whereof I have hereunto set my hand as the clerk aforesaid and affixed the seal of said court at Duluth, in the district of Minnesota, this 4th day of November, A. D. 1922.

JOEL M. DICKEY, *Clerk.*
By E. CATHERINE NEFF, *Deputy.*

(Seal of U. S. District Court, District of Minnesota, Fifth Division.)

[File endorsement omitted.]

119 [Title omitted.]

121 In United States Circuit Court of Appeals, Eighth Circuit

ALWORTH-STEPHENS COMPANY, PLAINTIFF AND respondent,
vs.
MARGARET C. LYNCH, EXECUTRIX OF THE LAST WILL and testament and of the estate of E. J. Lynch, deceased, substituted as defendant in the place of said E. J. Lynch as collector of internal revenue for the district of Minnesota, deceased, defendant and appellant

Stipulation for printing of exhibits

Filed June 26, 1923

It is hereby stipulated and agreed by and between the parties to the above entitled action that as a part of the record upon which said action may be heard and determined in the Circuit Court of Appeals, Eighth Circuit, the clerk of said court may print and make a part of the record upon said appeal the following exhibits, which were offered and received in evidence upon the trial of said case, to-wit:

Plaintiff's Exhibit 1: Stipulation of facts; also copies of mining-contracts, leases, etc.

Plaintiff's Exhibit 2: Income tax return of Alworth Stephens Company for the year '17, '18, and '19 and claims for refund.

Plaintiff's Exhibit 3: Statement of iron ore shipped from Hudson and Perkins Mines from 1913 to 1919.

Plaintiff's Exhibit 4: Letter from Treasury Department, U. S., to Alworth-Stephens Company.

Plaintiff's Exhibit 5: Letters from Department of Justice to W. D. Bailey and correspondence from W. D. Bailey to Department of Justice.

Plaintiff's Exhibit 6: Letter from Treasury Department, U. S., to Alworth-Stephens Company.

Plaintiff's Exhibit 7: Letters from Treasury Department, U. S., to Alworth-Stephens Company and copy.

Plaintiff's Exhibit 8: Letter from Treasury Department, U. S., to Alworth-Stephens Company.

122 Plaintiff's Exhibit 9: Letter from Treasury Department, U. S., to Alworth-Stephens Company.

Plaintiff's Exhibit 10: Letter from Alworth-Stephens Company to internal revenue collector.

Plaintiff's Exhibit 11: Letter from Treasury Department, U. S., to Alworth-Stephens Company.

Plaintiff's Exhibit 12: Letter and reply from Treasury Department, U. S., to Alworth-Stephens Company.

Plaintiff's Exhibit 13: Letter from U. S. Treasury Department, to Alworth-Stephens Company and reply.

Defendant's Exhibit AA: Copies of corporation income tax returns for the year 1909, 1910, 1912, 1914, 1915, 1916.

Defendant's Exhibit BB: Certificate of N. A. Nelson, secretary of Minnesota Tax Commission, certifying that statement attached is a true and correct record of shipments from Hudson & Perkins mines.

Defendant's Exhibit CC: Statement of shipment of tonnages from Perkins mine from May 1, 1913, to May 1, 1914.

WASHBURN, BAILEY & MITCHELL,
Attorneys for Plaintiff and Respondent.
LAFAYETTE FRENCH, Jr.,
U. S. Attorney and Attorney for Defendant-Appellant.

(File endorsement omitted.)

CERTIFICATE OF CLERK TO EXHIBITS

UNITED STATES DISTRICT COURT,
District of Minnesota, Fifth Division.

I, Joel M. Dickey, clerk of the District Court of the United States for the District of Minnesota, do hereby certify that the within plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 and defendant's Exhibits AA, BB, and CC are the original exhibits filed in my office in the case of Alworth-Stephens Company, plaintiff, vs. Margaret C. Lynch, executrix of the last will and testament and of the estate of E. J. Lynch, deceased, substituted as defendant in the place of said E. J. Lynch as collector of internal revenue
123 for the district of Minnesota, deceased, and designated in the stipulation and order filed in the above entitled cause, making said original exhibits a part of the record on appeal in said cause.

In witness whereof I have hereunto set my hand as the clerk aforesaid and affixed the seal of said court at Duluth, in the district of Minnesota, this 4th day of November, A. D. 1922.

JOEL M. DICKEY, *Clerk*,
By E. CATHERINE NEFF, *Deputy*.

(Seal of U. S. Dist. Court, Dist. of Minnesota, Fifth Division.)

United States District Court, District of Minnesota, Fifth Division

No. 624

PLAINTIFF'S EXHIBIT 1

Filed June 6, 1921

ALWORTH-STEPHENS COMPANY, PLAINTIFF
v.
E. J. LYNCH, COLLECTOR OF INTERNAL REVENUE, defendant

Stipulation of facts

For the purpose of shortening the trial of this cause the following stipulation is made:

1. That in the year 1907 Marshall H. Alworth and J. L. Washburn of Duluth, Minnesota, negotiated with Henry Stephens and Albert L. Stephens, of Detroit, Michigan, for an exploratory option contract upon about 5,000 acres of land owned by said Henry Stephens and Albert L. Stephens in St. Louis County, Minnesota, resulting in the execution by said Henry Stephens and wife and and Albert L. Stephens and wife to the said Marshall H. Alworth of such contract, the same being dated September 4, 1907, 124 and recorded in the office of the register of deeds of St. Louis County, Minnesota, September 19, 1907, in Book 4 of Agreements, page 464, said contract, marked "Exhibit A," being made a part of this stipulation.

2. That the Alworth-Stephens Company was organized in September, 1907, its articles of incorporation being duly filed and recorded in said month in the office of the register of deeds of St. Louis County and of the secretary of state of the State of Minnesota, and duly published, the said original articles being marked "Exhibit B" and made a part of this stipulation. That the by-laws were duly adopted by said corporation, the same being marked "Exhibit C" and made a part of this stipulation. That the said Alworth, his wife joining, assigned the said option contract, "Exhibit A," to the said Alworth-Stephens Company by agreement in which the said Alworth-Stephens Company assumed all the obligations of said Alworth in said contract, said assignment being dated October 5, 1907, and recorded in the office of the register of deeds of St. Louis County on said day in Book 5 of Agreements, page 180. The said assignment, marked "Exhibit D," is made a part of this stipulation.

3. That the authorized capital as specified in said articles of incorporation was placed at $100,000.00, and the subscription list was executed and presented to the board of directors on the 19th day of September, 1907, for the entire capital stock and was accepted by the board on said date, the same being as follows:

"We, the undersigned, do hereby subscribe to the capital stock of the Alworth-Stephens Company, and agree to take and pay therefor in cash at par, as called for by the board of directors, the number of shares set opposite our respective names, full-paid stock to be issued to each of us from time to time for the amount so called and paid.

"Dated September 19, 1907.

"Henry Stephens, subscribing for 166⅔ shares.

"Albert L. Stephens, subscribing for 166⅔ shares.

"J. L. Washburn, subscribing for 166⅔ shares.

"M. H. Alworth, subscribing for 300 shares.

"W. H. Cole, subscribing for 100 shares.

"W. C. Agnew, subscribing for 100 shares."

125 That no sales of the capital stock have ever been made by any of the stockholders or transfers thereof except those evidencing gifts to employees or members of families of stockholders, or division of the original subscriptions or allotments among associates of original subscribers. That there was called in by the board of directors for payment upon the subscriptions as follows:

Call number	Date	Percentage	Amount
1	October, 1907	5%	$5,000
2	December, 1907	5%	5,000
3	January, 1908	5%	5,000
4	March, 1908	5%	5,000
5	June, 1908	5%	5,000
Total			$25,000

and the same was duly paid in upon such calls by the then subscribers to or owners of the stock, and no other or further portion of the authorized capital stock was ever called for or paid in.

4. That the said company with the funds so provided proceeded to explore for iron upon certain of said lands during the year 1908, as shown by statement marked "E," made a part of this stipulation. That no expenditures were ever made by the said company from its own funds for exploration after 1908 except a small item paid on February 4, 1909, as shown on said statement for work done in 1908, and except an item of $1,073.00 expended in 1912 as shown on said statement and hereinafter mentioned.

5. That the exploration conducted in 1908 by the said company upon the SW. ¼ of NW. ¼ and NE. ¼ of SW. ¼ of section 26, township 59, range 15, resulted in the discovery of a body, or rather two bodies, of ore, the principal one being upon the NE. ¼ of SW. ¼, of section 26, and the exploration made on the N. ½ of NE. ¼ of section 11, township 59, range 14, disclosed the existence of a small body of ore, such expenditures amounting to about $18,000. The body of ore upon the NE. ¼ of SW. ¼ of section 26 became known

as the Perkins mine, and the ore upon said section 11 became known as the Silverton mine. That pursuant to the provisions of said option contract the said Alworth-Stephens Company applied to the fee owners for a lease upon said lands aggregating 160 acres above described, and there was pursuant to such request executed
126 by the said Henry Stephens and wife and Albert L. Stephens and wife, the owners of said property, under date of August 25, 1908, a mining lease thereon, the same being recorded in the office of the register of deeds of St. Louis County, Minnesota, on the 28th day of December, 1908, in Book 6 of Agreements, page 297, marked "F" and made a part of this stipulation.

6. That on the first of September, 1908, the said Alworth-Stephens Company made a sublease on said 160 acres of land covered by the last named lease to John S. Lutes, the same being dated September 1, 1908, and recorded in Book 10 of Agreements on page 235 in the office of the register of deeds of St. Louis County, Minnesota, the same providing for a royalty of 75 cents per ton, being an increased royalty of 45 cents per ton over and above that provided in the lease held by the said Alworth-Stephens Company last above named, and in addition thereto, there was paid to the said Alworth-Stephens Company as a further consideration for said lease on the 15th day of September, 1908, the sum of $17,868.50, being a return of exploration expenditures on said lands. That the said lease to the said Lutes is marked "Exhibit G" and made a part of this stipulation. That said Lutes assigned said lease to a corporation organized to operate said property known as the Perkins Mining Company which thereafter operated the property until the same was released, which is marked "G–1" and made a part hereof.

7. That in July, 1908, the said Alworth-Stephens Company granted an option to H. G. Dalton, of Cleveland, Ohio, as trustee, until August 1, 1909, to explore and take out a mining lease or leases upon certain tracts of land covered by the said exploratory contract, Exhibit A, and among others the NW. ¼ of NW. ¼ of section 4, township 58, range 15, in said county and State, which option is marked "Exhibit H" and made a part of this stipulation; said option was thereafter assigned to the Syracuse Mining Company, which said company expended considerable sums in exploration and thereafter surrendered the said lands except the NW. ¼ of NW. ¼ of section 4, township 58, range 15, upon which a body of ore had been discovered and upon said last named property a mining lease was called for pursuant to the terms of said option. That thereupon the Alworth-Stephens Company called for a lease upon said property from the fee owners thereof, and the same was duly executed and was dated March 12, 1909, and recorded on the 19th day
127 of April, 1909, in Book 6 of Agreements, page 402, the same being marked "Exhibit I" and made a part of this stipulation, and the said Alworth-Stephens Company thereupon executed to the said Syracuse Mining Company a sublease on said property, which was thereafter known as the Hudson mine, the sublease being

dated March 12, 1909, and recorded April 19, 1909, in Book 6 of Agreements, page 408. The same is marked "Exhibit J" and made a part of this stipulation. That the royalty provided in said lease, Exhibit J, to be paid to the Alworth-Stephens Company was 60 cents per ton, being an increase of 30 cents over that provided in the lease to the said Alworth-Stephens Company.

8. That the said Alworth-Stephens Company after 1908 did not expend any of its own funds in the said exploration, but made option contracts with other parties for the exploration of said lands with the right to take out mining leases thereon, and executed various option contracts of that character to diverse and sundry people who conducted explorations, all resulting in the discovery of no further bodies or ore except that in the year 1912 a controversy having ensued between the Oliver Iron Mining Company and the owners of what is known as the Stephens mine, being a large body of developed ore situated in township 59, range 15, an adjustment of such controversy was made by a sale of the fee of said property to the said Oliver Iron Mining Company on a basis which provided for a further and more complete exploration of said property to determine the amount of ore therein as a basis of such sale. Such explorations having shown ore near to the north boundary of the SE. ¼ of SE. ¼ of section 26, township 59, range 15, a tract of land on which said Oliver Iron Mining Company had a dump lease giving them the right to use the surface for dumping purposes, and it desiring to purchase the fee of said tract from the owners thereof, the Alworth-Stephens Company concluded to expend a small amount of money in putting down some holes near the said boundary, and it expended as shown by the said statement "E" the sum of $1,073.00 and disclosed a very small amount mostly of low grade ore in the northeast corner of the said forty acres, but never leased the same for the reason that the same was insufficient in quantity, and in August, 1915, released the same to the fee owners for a consideration of $2,500.00. The blue print of said forty acres, marked "Exhibit K," is made a part of this stipulation.

9. That the Alworth-Stephens Company never owned any
128 other property or conducted any transactions with reference to any other property save and except that covered by Exhibit A, and that it never received any moneys from any sources whatsoever except from royalties under the said Perkins and Hudson leases, the $25,000 paid in by the subscribers to its stock, the $17,868.50 paid for the Perkins lease, and the said $2,500 paid for release of said above named forty acres, and Exhibit E shows the total amount of receipts and disbursements for the entire period of its existence of the said Alworth-Stephens Company. That the only business it conducted outside of the payment of taxes and expenses of explorations shown on Exhibit E was the collection of the said royalties and distribution of same to its shareholders and the fee owners, and that Exhibit L, made a part of this stipulation, is a table showing the receipts of such royalties, the amounts paid to the fee owners, the

amounts paid to the stockholders, and the dates thereof. That Exhibit M, made a part of this stipulation, is a statement showing the taxes paid by the Alworth-Stephens Company and the dates thereof.

10. That on the 20th day of December, 1918, the said Syracuse Mining Company having mined out the body of ore known as the Hudson mine released the said NW. ¼ of NW. ¼ of section 4, township 58, range 15, the location thereof, to the said Alworth-Stephens Company, which release was recorded in the office of the register of deeds of St. Louis County, Minnesota, December 30, 1918, in Book 22 of Agreements on page 135, the same being marked "Exhibit N" and made a part of this stipulation, and the said Alworth-Stephens Company thereupon and of date of January 31, 1919, released said land to the owners thereof, the release being recorded in the office of the register of deeds of St. Louis County, Minnesota, in Book 23 of Agreements, page 51, copy of which, marked "Exhibit O," is made a part of this stipulation. That in the month of September, 1919, the Perkins Mining Company released all of said lands covered by its lease, the same being dated September 20, 1919, and recorded in the office of the register of deeds of St. Louis County, Minnesota, on the 24th day of September, 1919, in Book 20 of Agreements, page 447, the same, marked "Exhibit P," being made a part of this stipulation. That thereupon the Alworth-Stephens Company released the said premises to the fee owners thereof by instrument dated December 26, 1919, and recorded in the office of the register of deeds of St. Louis County, Minnesota, in Book 20 of Agreements, page 503, copy thereof, marked "Exhibit Q," being made a part of this stipulation.

129 11. That on the 28th day of July, 1915, said Alworth-Stephens Company released to the owners thereof all of the lands covered by Exhibit A except the lands held under lease by the Perkins Mining Company and the Syracuse Mining Company, and the said SE. ¼ of SE. ¼ of section 26, township 59, range 15, known as the Dump 40, and thereafter and on the 26th day of August, 1915, released the said last named 40 as hereinbefore set forth, copy of the said releases thereof, though not filled out as to the execution, marked "Exhibits R and S," are made a part of this stipulation, the originals having been delivered and recorded in the office of the register of deeds.

That exploration blue prints on certain of said properties in possession of the plaintiff are submitted as part of this stipulation without marking.

WASHBURN, BAILEY & MITCHELL,
Attorneys for Plaintiff.

ALFRED JAQUES,
United States Attorney.

NEWTON K. FOX,
Special Attorney, Bureau of Internal Revenue.

[File endorsement omitted.]

EXHIBIT A

This agreement, made and entered into this fourth day of September, A. D. 1907, by and between Henry Stephens and Sarah M. Stephens, his wife, Albert L. Stephens and Frances H. Stephens, his wife, as parties of the first and Marshall H. Alworth of Duluth, Minnesota, as party of the second part,

Witnesseth: That the said parties of the first part, for and in consideration of the sum of one dollar, and other valuable considerations, the receipt whereof is hereby acknowledged, do hereby give and grant unto the said party of the second part, his heirs and assigns, for the period of ten (10) years from this date, unless otherwise sooner terminated as hereinafter mentioned, the exclusive right and option to enter upon all of the lands and premises here-
130 inafter described and to explore the same for iron ore, together with the exclusive right and option to ask for, demand, have, and receive from the said parties of the first part a mining lease or leases upon the several parcels of said land, for such tracts as he shall elect in each lease, such leases to be substantially in the form of mining lease hereto attached and made a part hereof, the same to run for a period of fifty (50) years from the date thereof and to provide for the mining and removal of a quantity of ore equivalent to twenty-five thousand (25,000) tons per forty acres annually from the leased premises described in each lease, or the payment of a royalty upon said minimum annual amount at the rate of thirty cents per ton, payment of such minimum royalty or royalties upon ore mined and removed, to be made quarterly at the dates mentioned in said form of lease hereto attached.

Each of said leases when taken out shall specify the respective ownerships of the lessors and provide for the payment of each of his respective portion of the royalties to accrue thereunder at such bank or banks as said parties may from time to time severally designate upon taking out of any leases hereunder all taxes thereafter to accrue on the lands so leased or upon the ore therein, which shall be paid by the lessee as provided in said form of leases hereto attached.

The lands and premises above referred to are situated in the county of St. Louis and State of Minnesota and are described as follows, to wit:

Lands in township fifty-eight (58) north, of range fourteen (14) west;

The south half of the northwest quarter and the north half of the southwest quarter of section five (5), and the east half of the northeast quarter of section six (6);

Lands in township fifty-nine (59) north, of range fourteen (14) west;

The south half of the southeast quarter and the north half of the southwest quarter of section two (2); the south half of section three (3); the southeast quarter of the southeast quarter, the north-

west quarter of the northeast quarter, the east half of the northwest quarter, and the northwest quarter of the northwest quarter of section four (4); the northeast quarter of the northeast
131 quarter, the northwest quarter of the northwest quarter, and the southwest quarter of the southwest quarter of section five (5); the northeast quarter of the northeast quarter, the north half of the northwest quarter and the southeast quarter of the northwest quarter of section six (6); the east half of the northeast quarter, and the northwest quarter of the northeast quarter of section seven (7); the northwest quarter and the southeast quarter of section eight (8); the southwest quarter, and the south half of the northwest quarter, and the southeast quarter of the northeast quarter of section nine (9); the southeast quarter of the northeast quarter, and the south half of the northwest quarter, the northeast quarter of the southwest quarter, and the northeast quarter of the southeast quarter of section ten (10); the north half of the northeast quarter and the south half of the northwest quarter of section eleven (11); the north half of the northeast quarter, the east half of the northwest quarter, and the west half of the southwest quarter of section seventeen (17); the north half of the northwest quarter, the southwest quarter of the northwest quarter, and the northwest quarter of the southwest quarter of section nineteen (19); the southwest quarter of the southwest quarter, and the west half of the southeast quarter of section twenty-two (22); the northwest quarter of the northwest quarter of section twenty-four (24); the northeast quarter of the northwest quarter of section twenty-eight (28); the northwest quarter of the northeast quarter of section thirty-one (31); the southwest quarter of the northeast quarter, the south half of the northwest quarter, and the northwest quarter of the northwest quarter of section thirty-two (32);

Lands in township fifty-eight (58) north, of range fifteen (15) west;

The northeast quarter of the northeast quarter, and the northwest quarter of the northwest quarter of section four (4);

Lands in township fifty-nine (59) north, of range fifteen (15) west;

The south half of the northwest quarter, the north half of the southwest quarter, and the southwest quarter of the southwest quarter of section thirteen (13); lots one (1), two (2), seven (7), and eight (8) and the northwest quarter of the northeast quarter of section eighteen (18), the south half of the northeast quarter and
132 the northwest quarter of the northeast quarter of section twenty-three (23); the west half of the northwest quarter, the southeast quarter of the northwest quarter, and the northwest quarter of the southwest quarter of section twenty-four (24); the north half of the southeast quarter, the east half of the southwest quarter, and the southwest quarter of the southwest quarter of section twenty-five (25); the south half of the southeast quarter, the east half of the southwest quarter, and the southwest quarter of the

northwest quarter of section twenty-six (26); the northwest quarter of the northeast quarter, the west half of the northwest quarter, and lot one (1) of section twenty-nine (29); lots eight (8) and nine (9) of section thirty (30); the west half of the northeast quarter, the southeast quarter of the northeast quarter, lots one (1), two (2), and three (3), and the southwest quarter of the southeast quarter of section thirty-two (32); the southwest quarter of the northwest quarter, the southwest quarter of the southwest quarter, the south half of the southeast quarter of the southwest quarter, and the south half of the southeast quarter of section thirty-three (33); the northeast quarter of section thirty-four (34); the northwest quarter of the northeast quarter, and the east half of the northwest quarter of section thirty-five (35);

Lands in township fifty-eight (58) north, of range sixteen (16) west;

The northeast quarter of the northwest quarter of section seventeen (17);

Lands in township fifty-nine (59) north, of range sixteen (16) west:

The southeast quarter of section ten (10); the northeast quarter of section fifteen (15); the south half of the southeast quarter of section twenty (20); the southwest quarter of the southwest quarter of section twenty-one (21); the northwest quarter of the northwest quarter of section twenty-eight (28); the west half of the northeast quarter and all of the northwest quarter of section thirty (30); the north half and the southwest quarter of section thirty-one (31):

Lands in township fifty-seven (57) north, of range seventeen (17) west;

133 The northeast quarter of the northeast quarter of section one (1);

Lands in township fifty-seven (57) north, of range twenty (20) west;

The north half of the northwest quarter of section two (2);

Lands in township fifty-eight (58) north, of range twenty (20) west;

The northwest quarter of the northeast quarter of section thirty (30), and the southwest quarter of section thirty-five (35);

And the said party of the second part, in consideration thereof, hereby agrees to select one or more parcels from said body of land, upon which to enter and begin such work of exploration and development and to begin such work within thirty (30) days from the execution and delivery of this instrument, and to keep continuously employed in the prosecution of such work during the life of this contract, or until the same be surrendered as hereinafter provided, not less than three men, engaged either as a test pitting crew or in the operation of a diamond or churn drill, except when such work is interrupted by accident, labor strikes, or the action of the elements, and in case of such interruption the said party of the second part shall resume operations as soon as practicable thereafter.

Whenever the said party of the second part, his heirs, or assigns shall have so far developed a tract or tracts of the lands hereinbefore described as to desire the execution and delivery of a mining lease or leases thereon, in accordance with the terms hereof, he shall notify the said parties of the first part in writing to that effect, whereupon the said parties of the first part covenant and agree to execute and deliver such mining lease or leases as speedily as practicable, and at all events within thirty days from the date of the service of such notice. It shall be a sufficient service of such notice if the same be mailed at the post office in the city of Duluth, duly addressed, with postage prepaid thereon, to the last known address of the said parties of the first part, or if such notice be delivered personally.

The said party of the second part further covenants, in consideration hereof, that he will from time to time keep the said parties of the first part advised, at reasonable intervals, of the progress of the work of development being carried on and of the results
134 attained thereby and furnish to the said parties of the first part a map or diagram showing the location and extent of such work and the material encountered therein.

The said party of the second part, his heirs, and assigns shall have the right at any time to terminate this agreement by giving thirty days' notice thereof in writing and executing a surrender thereof, such notice to be given in the same manner as hereinbefore provided for the giving of notices requiring the execution of leases, and in case the said party of the second part, his heirs, or assigns shall surrender this contract then all obligations hereunder on the part of either party shall cease and the said contract shall be and become determined and at an end.

The said party of the second part further agrees that he will preserve the property hereinbefore described from any and all liens or claims on the part of laborers or material men arising by reason of the carrying on of such work of exploration and development.

It is agreed between the parties hereto that in case the said party of the second part shall cease his work of exploration and development, in accordance with the terms and conditions hereof, for a period of sixty days, except when reasonably prevented by accident, labor strikes, and the action of the elements, as hereinbefore provided, then and in that event the said parties of the first part shall have the right, upon notice duly given in writing, to terminate this agreement and all rights thereunder on the part of the party of the second part, his heirs, and assigns.

This agreement is made upon the condition that said Alworth shall at once proceed to organize a corporation under the mining laws of Minnesota, to be called the Alworth-Stephens Company, with an authorized capital of one hundred thousand dollars ($100,000.00), and will upon the completion of said organization assign this contract to such corporation, and thereby and thereupon all the

rights, privileges, options, and benefits of said Alworth under this contract shall enure to said corporation, and all of the obligations of said Alworth thereunder shall devolve upon said corporation, and the said corporation shall be and become the holder of this contract as fully and to the same extent as though it were named as the party of the second part herein instead of said Alworth. The stock of said corporation shall all be subscribed for, one-sixth thereof by said Henry Stephens, one-sixth thereof by said Albert L. Stephens,
135 and four-sixths thereof by said Marshall H. Alworth and such associates as he may invite, provided a majority of the stock shall be held by said Henry and Albert L. Stephens and said Alworth. Payments upon the stock in said corporation shall be made as called for by the board of directors as needed from time to time, and certificates of stock fully paid and non assessable shall be issued to the subscribers to the amount of such payments at par. If at any time it seems best to the board of directors to sublet any of the tracts hereinbefore described upon which it does not deem it best to carry on the work itself for the purpose of development with an option for lease upon such terms of increased royalty as the board may determine, it shall have the right and power to do so.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals, all the day and year first above written.

HENRY STEPHENS. [SEAL.]
SARAH M. STEPHENS. [SEAL.]
ALBERT L. STEPHENS. [SEAL.]
FRANCES H. STEPHENS. [SEAL.]
MARSHALL H. ALWORTH. [SEAL.]

Signed, sealed, and delivered in presence of—
J. L. WASHBURN.
G. L. MORRIS.
MARTIN G. BORGMAN.
M. M. WELLS.
GEO. W. WELLS.
Witnesses for Sarah M. Stephens.

STATE OF MICHIGAN,
County of Wayne, ss:

On this fourth day of September, 1907, before me a notary public within and for said county, personally appeared Henry Stephens, Albert L. Stephens and Frances H. Stephens, his wife, and Marshall H. Alworth, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

[NOTARY SEAL.] MARTIN G. BORGMAN, *Notary Public.*

My commission expires January 13th, 1911.

136 STATE OF NEW HAMPSHIRE,
County of Grafton, ss:

On this 13th day of September, 1907, before me a notary public within and for said county, personally appeared Sarah M. Stephens, wife of Henry Stephens, to me well known to be the same person described in and who executed the foregoing instrument and she acknowledged that she executed the same as her free act and deed.

[NOTARY SEAL.] GEO. W. WELLS, *Notary Public.*
Com. expires June 14, 1908.

This indenture, made this ____ day of _____ in the year of our Lord one thousand nine hundred and ____ by and between Henry Stephens and Sarah M. Stephens, his wife, Albert L. Stephens and Frances H. Stephens, his wife, as parties of the first part, hereinafter called the lessors, and the Alworth-Stephens Company, a corporation created and existing under the laws of the State of Minnesota, as party of the second part, hereinafter designated as the lessee,

Witnesseth, that the said lessors, for and in consideration of the sum of one dollar, and other valuable considerations to them in hand paid by the lessee, the receipt whereof is hereby acknowledged, and in further consideration of the covenants, promises and conditions hereinafter contained, to be kept and performed by the lessee, do hereby let, lease and demise unto the lessee, its successors and assigns, for a term of fifty (50) years from and after the date of this instrument, the following described lands situated in the county of St. Louis and State of Minnesota, to-wit:

Said lands are hereby leased by the lessors to the lessee for the purpose of exploring for, mining, taking out and removing therefrom the merchantable iron ore (as well as other minerals, as hereinafter provided for) which is or which may hereafter be found on, in or under said lands, together with the right to construct all buildings and to make all excavations, openings, ditches, drains, railroads, wagon roads and all other improvements upon said
137 lands and premises, which are or may become necessary or suitable for the mining or removing of the iron ore therefrom, and the carrying on *on* mining operations thereon, and together with the right, during the continuance of this lease, to cut and use all of the timber, other than pine timber, which may be found upon said lands, free and without charge, so far as may be necessary for fuel and in the construction of buildings required in the operation of any mine or mines upon said lands, and for drains, tram-ways, supports or shafts of or within any such mine or mines, or in connecting the same with any line or lines of railroad over or upon which the said ore may be transported.

Provided, however, that the lessee, its successors or assigns, shall have the right at any time, upon thirty days' notice, to terminate this agreement and lease, in so far as it requires the lessee to mine ore on said lands or to pay royalty therefor, or to pay taxes thereon, by giving written notice in manner as hereinafter provided, to the lessors or their legal representatives or their assigns, who shall, in such case, acknowledge in writing the receipt of such notice, and this lease shall terminate thirty days after the giving of such notice, whether so acknowledged or otherwise. All arrearages and sums, including taxes which may be due and payable under this lease up to the time of its termination as set forth in such notice shall be paid within thirty days after such termination, and the lessee, its successors or assigns, upon such termination shall immediately execute and record formal relinquishment of such lease in the office of the register of deeds of the county of St. Louis. Such notice of termination may be delivered personally to the lessors, their legal representatives or assigns, or it may be given by registered letters mailed from any post office in the United States, postage prepaid, and addressed to the lessors or their legal representatives or assigns at their last known respective places of residence.

The lessors hereby further agree that the lessee, its successors and assigns, shall have the right to assign this lease or contract with others to work any mine or mines which are now or may hereafter be discovered upon said lands, or sub-contract or sub-let the same, at their option, with the same rights and privileges as are hereby granted to the lessee, it being expressly understood, however, that any such assignment shall not operate as a release or discharge of the lessee from the performance of the conditions of this lease until and unless the lessors shall specifically consent to said assignment in writing.

138 The lessee, for its self, its successors and assigns, hereby covenants and agrees to and with the lessors that the lessee will from and after the date hereof and on or before the tenth days of January, April, July, and October, in each calendar year covered by the term of this lease, or for the period of time for which this contract and lease continues in force, to pay to the lessors for all iron ore which shall be mined and removed from said lands during the three calendar months next preceding the first day of the month in which payment is to be made as aforesaid, a royalty of thirty cents per ton for all iron ore so taken out, mined, and carried away from said lands and premises, each ton in all cases to be reckoned at 2,240 pounds.

The lessee, for itself, its successors and assigns, hereby covenants and agrees to and with the lessors that from and after the date of this lease, during each and every calendar year for the period of the term of this lease, or until the surrender or assignment of the same, in the manner herein provided, the lessee will mine and remove from the said lands (which for all and singular the purposes of this lease

shall be inseparable and considered as one tract or parcel) at least ------ thousand tons annually of iron ore, or that it will pay to the lessors an advance royalty, which shall be treated and considered as ground rent of thirty cents per gross ton on such minimum quantity each year, the same as if actually mined and removed;

It being the intention hereof that it shall be optional with the lessee either to mine, remove, or ship away iron ore from said premises during each calendar year while this lease continues in force, or, in lieu thereof, to pay the lessors an advance royalty of thirty cents per ton on said annual minimum quantity above described/ the same as if actually mined and removed. The said obligation of the said lessee to pay said advance royalty of thirty cents per gross ton, upon ------ thousand tons annually, or such ground rent equivalent to thirty cents per ton upon said minimum annual quantity, shall continue in force without regard to the quantity or quality or ore existing in said premises, during the full term of this lease, or until the same is terminated or surrendered or assigned in the manner herein provided; and in case of assignment of this lease in the manner herein provided the obligation to mine and pay for such annual minimum quantity of ore, as well as all other provisions of this lease, shall rest upon and bind such assignee as fully as the lessee is hereby bound.

The said ground rent or advance royalty herein agreed to
139 be paid, shall become due and be paid quarterly, at the times and in the manner as hereinbefore provided for the payment for ore actually mined and shipped away; Provided, however, that if in any one or more years, or in any quarter or quarters of any year or years, more ore is thus paid for than is actually mined and removed in such year or years, or in any quarter or quarters of any such year or years, then and in such case the iron ore so paid for and not removed may be removed in any subsequent year or years, or in any subsequent quarter or quarters of such year or years, during the continuance of this lease, without other payment therefor, but such ore so permitted to be removed in any subsequent quarter or quarters of such year must be in excess of the aggregate minimum amount agreed herein to be mined and removed or paid for during all of the quarters of such year, which shall have, at the time of such payment, expired, and the ore so permitted to be removed in any subsequent year, in consideration of such pre-payment, must be in excess of the stipulated amount agreed to be mined and removed and paid for, whether mined or not, during such year, it being the intention hereof that the lessee shall not be required to make pre-payment as advance royalties or ground rent for any greater quantity of iron ore during any year of this lease than ------ thousand tons annually unless a greater quantity than said amount is actually mined and removed from said premises.

The lessee, its successors, and assigns, at the time of making each of said payments, shall transmit to the lessors, their legal representative or assigns, an exact, truthful statement of the amount of *he*

amount of iron ore removed from said lands for the three calendar months for which such payment is to be made. The iron ore so taken out by the lessee, its successors or assigns, from said lands, shall be weighed by the railroad company transporting the same therefrom, which weights shall determine the quantity as between the parties hereto prima facie.

The lessee, its successors or assigns, shall furnish to the lessors, monthly statements showing the aforesaid weights. The right, however, is hereby conceded to and reserved by the said lessors, by their duly authorized agents, to inspect, view, and test the correctness of the railroad company's weights at any time, and in such manner as may seem proper to adopt; it being understood that any errors in these respects, when ascertained, are to be cognizable and corrected and any such differences shall be settled and paid for at the next regular quarterly payment.

140 The lessee hereby covenants and agrees to conduct all its mining operations on said lands in a good, workmanlike manner, and in accordance with the requirements of good engineering and so as not to be or cause or permit any unnecessary or unusual permanent injury to the same or inconvenience or hindrance in the subsequent operation of the mine or mines thereon.

The lessee shall pay all taxes and assessments, ordinary and extraordinary, general, and specific, which may be levied or assessed upon the lands demised hereby and on the iron ore mined thereon, and on all improvements and personal property thereon, while this lease is in force, and shall furnish the lessors with duplicate tax receipts showing the payment of any such assessments or taxes; provided, however, that the lessee shall have the right to contest, in the courts or otherwise, the validity of any such taxes or assessments, in case it shall deem the same unjust, unequal, or excessive, or to take such other steps or proceedings as they may deem necessary to compel or secure a reduction, readjustment or equalization thereof, before he shall be required hereunder to pay or discharge the same or any part thereof, and at the termination of this lease, or in case the same is surrendered in manner as hereinbefore provided, the lessee further hereby agrees peaceably to surrender possession of said lands to the lessors.

The lessee hereby further covenants and agrees that, while this lease is in force and until it is surrendered or assigned in manner as herein provided, it will protect the said lands and premises from all mechanics' liens or labor liens and keep the title to the same free and clear from all clouds and encumbrances arising therefrom in any way on account of its mining operations thereon or the use and occupation thereof by it, its agents, servants, or employees, or its contractors.

The lessors hereby expressly covenant and represent that the said leased lands are now owned in fee by them in the following proportions, to wit: Henry Stephens an undivided seven-ninths thereof, and Albert L. Stephens an undivided two-ninths thereof.

The several payments required hereunder to be made shall be made at the ------ or at any other bank or place that the lessors, their legal representative or assigns may from time to time in writing designate, and the bank or banks so designated shall be considered and treated as the agent or agents of lesors, respec-
141 tively, for the purpose of receiving, collecting, and receipting for such payments. The payments provided in this lease to be made by the lessee, shall be made in gold coin of the United States of the present standard, or its equivalent.

It is mutually understood and agreed that upon the termination of this lease, whether by the acts of the parties or either of them or by expiration of the term, the lessee, its successors and assigns, shall have sixty day in which to remove all engines, tools, machinery, railroad tracks, or structures erected or placed by them upon said premises, provided that all taxes, royalties, or other dues have been paid and other conditions performed, but it or they shall not remove or impair any supports placed in the mine or mines, or any timber or frame work necessary to the use or maintenance of the shafts or approaches to the mine or mines or the tram-ways within the same, and on failure within the time above specified to so remove such property all of the same shall belong to and become the property of the lessors or their successors in interest.

The lessors expressly reserve to themselves (and the lessee hereby assents thereto) the right, by their duly authorized agents, to enter into or upon said leased lands, mines, and premises at any time or times, to inspect or survey the same and to measure the quantity of ore that shall have been mined or removed therefrom, not unnecesssarily or unreasonably hindering or interrupting the operations of the lessee.

This lease is upon the express condition that if such royalty, or any part thereof, be and remain unpaid after the days and times above specified and if the same remain in default for a period of sixty days, or in case the lessee fails to keep any of the covenants or conditions herein expressed to be kept and performed by it, and such failure shall continue for sixty days after receiving written notice from the lessors specifying the default, neglect, or failure complained of, then and from thenceforth and in either of these events, but not otherwise, it shall be lawful for the lessors, at their option, to take possession of the said leased lands, *e*ith or without any previous process whatsoever, and to re-enter and have and possess the same again as fully as if no lease had been given to the lesse's, and it and all parties claiming under it shall be wholly excluded therefrom, and the lessors hereby reserve and shall at all times have, possess, and hold a lien upon all iron ore mined and upon all improvements made upon said lands and premises by the lessee for unpaid balances hereunder.

142 In case other ores or minerals are discovered or mined on said lands by the lessee, it being hereby expressly granted the right to mine and remove the same, the royalty thereon shall be

thirty-three per centum of the market value or selling price of all such ores or minerals at the market or markets therefor, less all transportation charges, which shall first be deducted from such market value or selling price and retained by the lessee, such royalty to be due and payable at the same times and in the same manner that the royalty on the iron ore shall be due and payable, and quarterly reports of the quality, grade, and quantity of such ores and minerals shall be made at the same times and in the same manner that the iron ore reports are required to be made hereunder.

The covenants, terms, and conditions of this lease shall run with the land and be in all respects binding and operative upon the heirs, legal representatives, successors, and assigns of both parties hereto.

In testimony whereof the parties of the first part have hereunto set their hand and seals, and the party of the second part has caused its corporate name and seal to be hereto affixed and these presents to be attested by its president and secretary, all the day and year first above written.

---------- [SEAL.]
---------- [SEAL.]
---------- [SEAL.]
---------- [SEAL.]
---------- [SEAL.]
---------- [SEAL.]
---------- [SEAL.]

Signed, sealed, and delivered in the presence of—

(Endorsed:)

Henry Stephens and wife, Albert L. Stephens and wife, to Marshall H. Alworth.

Exploratory contract.

Duplicate of this agreement was recorded in office register of deeds, St. Louis County, Minnesota, Sept. 19/1907, 3.30 p. m., in Book 4 of Agreements, page 464. J. D. Washburn.

143 EXHIBIT B

Articles of incorporation of the Alworth-Stephens Company

Know all men by these presents that we, the undersigned, do hereby associate ourselves together and agree to be and become a corporation under and by virtue of the general laws of the State of Minnesota, and for that purpose do hereby agree to adopt and sign the following articles of incorporation:

Article I

The name of this corporation shall be the Alworth-Stephens Company, and the general nature of its business shall be the buy-

ing, working, selling, and dealing in mineral lands and leases upon mineral lands; the exploring for, mining, smelting, and reducing, refining, and working of ores and minerals; the acquiring of leases upon mineral lands and interests therein and the sale and disposition of such leases and the leasing and sub-leasing of mineral lands and interests therein.

The principal place of transacting the business of this corporation shall be the city of Duluth, in the county of St. Louis and State of Minnesota, but it may carry on its business and exercise its powers in any part of the United States where it may qualify to do business.

Article II

The time of the commencement of this corporation shall be September 20th, 1907, and the period of its continuance shall be thirty (30) years.

Article III

The names and places of residence of the persons forming this corporation are as follows: M. H. Alworth, J. L. Washburn, and L. I. Feetham, all of whom reside in the city of Duluth, Minnesota.

Article IV

The government of this corporation and the management of its affairs shall be vested in a board of five directors, all of whom shall be stockholders and who shall be elected each year by the
144 stockholders at their annual meeting, which annual meeting shall be held on the first Tuesday in September of each year, beginning with the year 1908, and each director shall serve until his successor has been duly elected and qualified.

The annual meetings of the stockholders shall be held at the office of the company in Duluth, Minnesota, and may be adjourned from time to time, and any and all business transacted at any adjourned meeting thereof shall be in all respects of the same validity as though transacted at the date specified for the annual meeting.

The board of directors shall have power to fill all vacancies occurring in said board or in the offices of the company, and the persons so selected by said board to fill such vacancies shall hold office for the unexpired term and until their successors are elected and qualified.

The board of directors shall also have power to make and adopt all such by laws, rules, and regulations for the management of the corporation and the conduct of the affairs and business thereof as it may deem best, and may amend, alter, or repeal the same from time to time; but any such by law or by laws so adopted may be repealed, amended, or substituted by other by law or by laws by a majority vote of the stockholders of the corporation at any annual

meeting or at any special meeting of the stockholders called for the purpose of considering the same.

The board of directors shall meet immediately following the adjournment of the annual stockholders' meeting each year, and at all events within ten days from such time, and elect the following officers of this corporation, viz: a president, a vice-president, a secretary, and a treasurer. The offices of secretary and treasurer may be held by the same person, and the office of treasurer may also be held by the president or vice-president. The secretary and treasurer need not be members of the board of directors.

M. H. Alworth, of Duluth, Minnesota, Henry Stephens and Albert L. Stephens, of Detroit, Michigan, William C. Agnew and J. L. Washburn, of Duluth, Minnesota, shall constitute the first board of directors of this corporation and shall serve as such until the annual meeting of the stockholders in the year 1908 is held and their successors thereat are elected and qualified. Until the election and organization of a new board of directors M. H. Alworth shall be president, Albert L. Stephens vice-president, L. I. Feetham secretary, and M. H. Alworth treasurer of the corporation.

145 The board of directors shall have power to create any other offices and fill the same, which it may deem best for the management of the affairs of the corporation, prescribe the duties thereof and terminate the same at will: may establish any branch offices or places of business and employ all such agents and servants as it may deem best and proper for the conduct of the company's business, and may fix the salaries and compensation to be paid to any and all officers, agents, and employees thereof and cause the same to be paid from the treasury of the corporation.

The board of directors shall have power to fix and declare dividends from time to time as in its judgment the earnings and assets of the corporation will justify.

Article V

The amount of the capital stock of this corporation shall be one hundred thousand dollars, and the same shall be divided into one thousand shares of one hundred dollars each. Said stock shall be sold only at par and shall be paid for in the manner prescribed by the board of directors. The stock of this corporation has all been subscribed for, and certificates of stock, full paid and nonassessable, may be issued from time to time, equivalent to the amount of stock so subscribed and paid for on such subscriptions.

Article VI

The highest amount of indebtedness or liability to which this corporation shall at any time be subject is the sum of fifty thousand dollars.

In witness whereof, we have hereunto subscribed our names and affixed our seals this eighth day of September, in the year of our Lord one thousand nine hundred and seven.

M. H. ALWORTH. [SEAL.]
J. L. WASHBURN. [SEAL.]
L. I. FEETHAM. [SEAL.]

Executed in the presence of—
A. C. GILLETTE,
R. R. EBMER.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 8th day of September, 1907, before me, a notary public
146 within and for said county personally appeared M. H. Alworth, J. L. Washburn, and L. I. Feetham, to me well known to be the incorporators named in the foregoing articles of incorporation, and they acknowledged that they executed such articles of incorporation as their free act and deed and for the uses and purposes therein expressed.

[NOTARY SEAL.] A. C. GILLETTE.
Notary Public, St. Louis Co., Minn.

My commission expires November 22nd, 1912.

(Endorsed:) Articles of incorporation of Alworth-Stephens Company. State of Minnesota, department of state: I hereby certify that the within instrument was filed for record in this office on the 11 day of Sept., A. D. 1907, at 9 o'clock a. m., and was duly recorded in Book O3 of Incorporations on page 608. Julius A. Schmahl, secretary of state. 110357. Office of register of deeds, State of Minnesota, county of St. Louis, ss: I hereby certify that the within instrument was filed in this office for record, Sep. 12, 1907, at 9.15 a. m., and was duly recorded in Book 4 of Misc., page 509. M. C. Palmer, register of deeds; by Thos. Clark, deputy.

EXHIBIT C

By-laws of the Alworth-Stephens Company

Article I. Meetings of stockholders

Section 1. All meetings of the stockholders, unless otherwise ordered, shall be held at the company's office in the city of Duluth, Minnesota, and the annual meeting thereof shall be held at the hour of ten o'clock in the forenoon of the day fixed therefor in the articles of incorporation. Any meetings of the stockholders, whether annual or special, may be adjourned from day to day and from time to time until the business thereof is completed. At all meetings of the stockholders each stockholder shall be entitled to one vote for each share of stock held and owned by him.

The books of the corporation shall be conclusive evidence of the ownership of such shares, as far as any and all of the transactions of such corporation is concerned.

147 At all meetings of the stockholders each stock holder may vote either in person or by proxy. If by proxy, such proxy shall be filed with the secretary of the meeting previous to the exercise of any powers thereunder.

Section 2. Notice of the time and place of the holding of the annual meeting of the stockholders shall be given in either of the following ways:

1. By publication thereof in any newspaper printed and published in the city of Duluth, Minnesota, at least ten days prior to the day set for the holding of such meeting.

2. By written notice, served personally or by mail or wire upon each stockholder whose residence is known to the officers issuing such notice, at least ten days prior to the day set for the holding of such meeting.

Such notice shall be signed by the secretary and shall specify the particular time and place of the holding of such meeting; provided, that in the absence, inability, neglect, or refusal of the secretary to act and cause the necessary and proper notice to be given, the president, or the vice president when acting in the place and stead of the president, may subscribe such notice and give the same in the same manner and with the same effect as though given by the secretary, and at the annual meetings of the stockholders any business may be transacted that the stockholders of the corporation are empowered to transact.

Section 3. Special meetings of the stockholders may be held at any time when called by the board of directors, and shall be called whenever at least three members of such board make request therefor in writing to the said board of directors, and shall be called by the secretary, president, or vice president when acting as president whenever requested thereto in writing by stockholders owning and holding a majority of the issued stock of the corporation.

Notice of the holding of such special meetings shall be given at least ten days prior to the day set for the holding thereof, in one of the several ways prescribed in the last preceding section for the giving of notice of the holding of the annual meetings, and such notice shall specify the time and place of the holding of such meeting and the object for which the same is called and the business to be transacted thereat, and no business shall be transacted at such meeting except such as shall have been specified in such notice or is fairly embraced or referred to therein. In case a request

148 in writing for the calling of such meeting is made, it shall specify the purpose for which such meeting is requested.

Section 4. Stockholders, either in person or by proxy, representing a majority of the stock of the corporation which has been issued, shall constitute a quorum in meetings of the stockholders, and each share of stock shall entitle the holder thereof to one vote and a

majority of all of the votes cast on any question, shall be necessary and sufficient for the determination thereof.

Article II. Meetings of the board of directors

Section 1. Regular meetings of the board of directors shall be held immediately after the adjournment of the annual meeting of the stockholders each year, and also upon the first Tuesday in each month, at the company's office in the city of Duluth, Minnesota, or at such other place within or without the State of Minnesota as may be convenient for the transaction of such business as may come before it. Such monthly meetings shall convene at ten o'clock a. m. and no notice thereof need be given.

Section 2. A special meeting of the board of directors may be called by the president whenever in his judgment it is necessary, and such meeting may be called at any time by a majority of such directors, and such meeting shall be called, either by the president, or the vice president when acting in the place of the president, or the secretary of the corporation, when requested thereto in writing by a majority of the board. Such request shall specify the purpose for which such meeting is called. The secretary, or in his absence, inability, neglect, or refusal to act, the president or the vice president when acting, shall give notice either personally or by mail or wire, to each director of such meeting, such notice when given personally to be given at least twenty-four hours prior, and when given by mail or wire to be given at least three days prior to the holding of such meeting, such notice to specify the time and place set for the holding of such meeting and the purpose for which such meeting is called, and no other business shall be transacted at such meeting except such as is specified in such notice or referred to therein, without the unanimous consent of the directors present.

Section 3. A majority of the board of directors shall be
149 necessary for a quorum, but a less number may adjourn from day to day or from time to time. A majority of those present, voting in the affirmative upon any proposition, shall be sufficient to carry the same, except as provided in sections 2 and 4 of Article V hereof.

Section 4. The board of directors shall have the general supervision and control of the company's business and shall have power to do all such acts not inconsistent with the general act of incorporation, the articles of incorporation, or by-laws of this corporation as they may deem for the best interests thereof; they may declare dividends upon the capital stock in such amounts and at such times as they deem for the best interests of the corporation and as may be warranted by the financial condition thereof.

Article III. Officers and duties of officers

Section 1. Whenever a vacancy occurs in the membership of the board of directors, or in any of the offices of this corporation, the same shall be filled by the board of directors by election until the

next annual meeting of the stockholders and until such vacancy shall be filled by virtue of an election held thereat.

Section 2. The president is the chief executive officer of the corporation; he shall have general oversight and care of its business and interests; shall preside at all meetings of the stockholders and directors, sign all certificates of stock and any and all contracts and instruments of a legal nature to which the corporation is a party; call all meetings of the stockholders and board of directors, as herein provided; and sign and give notice thereof at the times and in the manner herein provided. When the secretary shall fail to do so, he may sign the records of the meetings of the board of directors and stockholders of the corporation.

Section 3. It shall be the duty of the vice president to act in the place and stead of the president when, in case of sickness, absence, or other disability, the president is prevented from discharging the duties of his office, and when so acting he shall be clothed with the same powers and authority as the president.

Section 4. It shall be the duty of the secretary to keep, in a book provided for the purpose, a record of the meetings of the stockholders and directors and to subscribe and give the required notice of the holding of any meetings of the stockholders or directors; he shall be the custodian of the corporate seal of the corporation and shall affix the same to all instruments, deeds, contracts, certificates of stock, or other instruments requiring the same, executed on behalf of the corporation, and shall, by his signature, attest all of the acts of the corporation requiring the same and subscribe the records of the several meetings of the stockholders and directors, countersign and affix the seal to all certificates of the capital stock of this corporation, issued or to be issued to the respective holders thereof, and shall properly enter in a book to be kept for that purpose all transfers of the capital stock of this corporation, so as to show the names of the persons to whom the same are issued, by whom transferred, together with the residence of such persons, when known, the number and description of the shares, and the date of the issuance and transfer thereof; he shall properly file and safely keep all papers coming into his possession as secretary; he shall make annually a full written report to the stockholders of the affairs of the corporation and of its transactions during the preceding year.

Section 5. It shall be the duty of the treasurer to receive and safely keep all of the moneys of the corporation and to pay out and disburse the same, from time to time, as ordered by the board of directors. He shall take necessary and proper receipts therefor and keep proper books of account thereof and of the receipts and disbursements and of all of the financial transactions of the corporation; he shall make report to the stockholders at their annual meeting of the financial condition and transactions of the corporation and make any other report that from time to time may be required of him by the stockholders or directors, and keep the books and rec-

ords of his office so as to evidence in an intelligent manner the con
dition of the company and the transactions, and shall give such
bond as may be required and approved by the board. Unless other
wise ordered by the board, the treasurer shall sign all checks on the
bank account of the company.

Section 6. At any meeting of the stockholders or directors of the
corporation at which either of the officers are absent, a person may
be designated to act temporarily in the place and stead of such ab
sent officer, and the records of such meeting subscribed by such per
son or persons shall have the same force and effect as though made
by the regular officers of the corporation.

Section 7. The board of directors may appoint any other officer
or manager and engage all employees necessary in their judg
151 ment to the proper conduct of the business of the corporation
and may prescribe the duties of any such officers or managers
or employees, fix and determine the compensation thereof, and re
move and discharge the same at will.

Section 8. All of the books, papers, and records in the custody of
any officer of this corporation shall at all reasonable times be subject
to inspection of any officers or stockholders thereof, and whenever at
any time any officer of this corporation, in the discharge of his duties
requires information from any other officer thereof, the same, upon
reasonable request therefor, shall be furnished.

Section 9. Whenever in the judgment of the board the best in
terests of the corporation demand it, the board may remove any
officer of the corporation, including any member of such board, and
declare such office or membership vacant and proceed to fill such
vacancy as authorized in other cases.

Article IV. Stock and stockholders

Section 1. The certificates of stock of this corporation shall be in
a form to be adopted by the board of directors, the terms of which
shall conform to the requirements of the articles of incorporation.
They shall be signed by the president, countersigned by the secre
tary, and have the corporate seal affixed thereto, but no certificate of
stock shall be issued until the same has been fully paid for at par
either in cash or property accepted by the board as the equivalent
thereof.

Section 2. Certificates of stock shall be transferable only at the
office of the secretary, by endorsement of the owner, either in person
or by attorney, or by his legal representative duly authorized thereto
and the surrender of such certificate and the payment of all indebted
ness of the previous holder thereof to the corporation, and such
transfer shall not be valid, except as between the parties thereto, until
the same shall have been so entered upon the books of the corpora
tion so as to show the names of the parties to whom and by whom
transferred, the number and description of the shares, and the date
of transfer.

Section 3. A certificate or certificates of stock may be issued on the special order of the board of directors, in place of any certificate or certificates lost or destroyed, upon satisfactory proof being made thereof and adequate indemnity being given the corporation to secure it from loss resulting from the issuance of such new certificate or certificates.

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Article V. Miscellaneous

Section 1. The seal of this corporation shall be circular in form, of substantially the same size as notarial seals in general use in this State, and around the marginal circle thereof shall be engraved the words "The Alworth-Stephens Company," and across the space within the same the words "Corporate seal."

Section 2. These by-laws may be amended, added to, or repealed by the stockholders in annual meeting assembled or at any special meeting duly called for that purpose, and these by-laws may likewise be amended and such additional by-laws as shall be deemed necessary from time to time may be adopted by the board of directors at any regular meeting thereof or at any special meeting called for that purpose, a majority of such board concurring therein.

Section 3. Nothing in these by-laws contained shall prevent the transaction of business by the stockholders when all thereof are assembled in stockholders' meeting, or by the board of directors when all are present; nor shall anything herein contained be construed to prevent the stockholders from holding meetings without any previous notice thereof, upon the written consent and waiver of notice of all such stockholders, nor construed to prevent the board of directors from holding meetings and transacting business when all of the directors consent thereto in writing and waive notice thereof; and all business transacted at such stockholders' or directors' meetings so held, shall be as valid and binding as tho' such meetings were called upon notice as hereinbefore provided.

Section 4. No interest in real property held by this company shall be sold or disposed of except by majority vote of the board of directors and the concurrence therein, either by vote or in writing, of a majority in interest of the stockholders of the corporation.

EXHIBIT D

Assignment

Know all men by these presents, that the undersigned Marshall H. Alworth and Nellie Alworth, his wife, of the county of St. Louis and State of Minnesota, for and in consideration of the sum
153 of one dollar, and other valuable considerations to them in hand paid by the Alworth-Stephens Company, a corporation of the State of Minnesota, the receipt whereof is hereby acknowledged, do hereby sell, assign, transfer, and set over unto the said the Alworth-Stephens Company that certain exploratory contract made

and entered into between Henry Stephens and Sarah M. Stephens, his wife, Albert L. Stephens and Frances H. Stephens, his wife, as parties of the first part, and Marshall H. Alworth, as party of the second part, which contract was dated September 4", 1907, and recorded in the office of the register of deeds of St. Louis County, Minnesota, on the 19" day of September, 1907, in Book 4 of Agreements on page 464, together with all the rights, options and privileges therein granted, it being the intention of this instrument to give and grant unto the said the Alworth-Stephens Company all of the privileges and benefits of the said contract and to place the said company in the same position thereto as if it had originally been named as the party of the second part therein instead of said Alworth.

The said The Alworth-Stephens Company hereby assumes all of the obligations contained in the above-mentioned contract and agrees to be bound by and to carry out all of the terms and conditions thereof.

In witness whereof the said Marshall H. Alworth and Nellie Alworth, his wife, have hereunto set their hands and seals and the said The Alworth-Stephens Company has caused its corporate name and seal to be hereto affixed by its president and secretary all this fifth day of October, A. D. 1907.

MARSHALL H. ALWORTH. [SEAL.]
NELLIE ALWORTH. [SEAL.]
[CORPORATE SEAL.] THE ALWORTH-STEPHENS COMPANY,
By M. H. ALWORTH, *President*,
L. I. FEETHAM, *Secretary*.

Signed, sealed, and delivered in the presence of—
F. M. EMANUELSON,
L. I. FEETHAM,
Witnesses as to Assignor.
F. M. EMANUELSON,
C. M. VAN NORMAN,
Witnesses as to Assignee.

154 STATE OF MINNESOTA,
County of St. Louis, ss:

On this 5th day of October, 1907, before me a notary public within and for said county, personally appeared Marshall H. Alworth and Nellie Alworth, his wife, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

[NOTARY SEAL.] F. M. EMANUELSON,
Notary Public, St. Louis County, Minnesota.

My commission expires Mar. 11, 1912.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 5th day of October, 1907, before me, a notary public within and for said county, personally appeared M. H. Alworth and L. I.

Feetham, to me personally known, who being by me first duly sworn, did say that they are, respectively, the president and secretary of the Alworth-Stephens Company, the corporation above named; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors. And the said M. H. Alworth and L. I. Feetham acqknowledged said instrument to be the free act and deed of said corporation.

[NOTARY SEAL.] F. M. EMANUELSON,
Notary Public, St. Louis Co., Minn.

My commission expires Mar. 11, 1912.

(Endorsed:)

Assignment of exploratory contract. Marshall H. Alworth and wife to the Alworth-Stephens Company.

111400. Office of register of deeds, State of Minnesota, county of St. Louis, ss: I hereby certify that the within instrument was filed in this office for record Oct. 5, 1907, at 1.30 p. m., and was duly recorded in Book 5 of Agrmts., page 180. M. C. Palmer, register of deeds; by Thos. Clark, deputy.

J. L. Washburn. Compared, R. Reading, R.

EXHIBIT E

JUNE 1, 1921.

Alworth-Stephens Company—Statement of receipts and disbursements from 1908 to date

RECEIPTS

Received from 5 stock subscription calls	$25,000.00	
Received from J. S. Lutes as bonus for lease No. 1	17,868.50	
Received from relinquishment of rights to SE. ¼ of SE. ¼ of section 26–59–15	2,500.00	
Received from royalties from mining companies	1,242,397.86	
		$1,287,766.36

DISBURSEMENTS

Paid for drilling costs:

Feby. 4.			
1909	NW. of NW., 24–59–15	$537.00	
1908	SW. of NW., 26–59–15	7,278.00	
"	NE. of SW., 26 "	4,947.00	
"	NW. of SE., 25 "	1,170.00	
"	NW. of SE., 34 "	771.00	
"	SW. of NE., 34 "	498.00	
"	NW. of NE., 34 "	1,380.00	
"	NE. of NE., 34 "	615.00	
"	SE. of NE., 34 "	822.00	
"	N. ½ of NE., 11–59–14	5,424.50	
"	Union Hole #20, 11–59–14	132.00	
"	Union Hole #21, 11–59–14	87.00	
"	NW. of SW. / N. ½ of NW. / SW. of NW. 19–59–14	10,344.50	
"	NE. of NW., 28 "	3,216.00	
"	NW. of NW., 32 "	1,773.00	
1912	SE. of SE., 26–59–15 / NE. of SW., 25–59–15	1,073.00	
			40,068.00

Paid to fee owners	$574,186.36	
" to stockholders	574,186.36	
" Federal income taxes	33,846.96	
" money and credits	203.76	
" sundry expense	1,028.18	
" interest	34.94	
		$1,284,618.20
Cash on hand		$3,148.16

156 EXHIBIT F

This indenture, made this twenty-fifth day of August, in the year of our Lord one thousand nine hundred and eight (1908) by and between Henry Stephens and Sarah M. Stephens, his wife, Albert L. Stephens and Frances H. Stephens, his wife, parties of the first part, hereinafter called the lessors, and the Alworth-Stephens Company, a corporation created and existing under and by virtue of the laws of the State of Minnesota, as party of the second part, hereinafter designated as the lessee,

Witnesseth that the said lessors, for and in consideration of the sum of one dollar and other valuable considerations to them in hand paid by the lessee, the receipt whereof is hereby acknowledged, and in further consideration of the covenants, promises, and conditions hereinafter contained, to be kept and performed by the lessee, do hereby let, lease, and demise unto the lessee, its successors and assigns, for a term of fifty (50) years from and after the date of this instrument, the following described lands situated in the county of St. Louis and State of Minnesota, to wit:

The southwest quarter of the northwest quarter and the northeast quarter of the southwest quarter of section twenty-six (26) in township fifty-nine (59) north, of range fifteen (15) west; and the north half of the northeast quarter of section eleven (11) in township fifty-nine (59) north, of range fourteen (14) west of the fourth principal meridian.

Said lands are hereby leased by the lessors to the lessee for the purpose of exploring for, mining, taking out, and removing therefrom the merchantable iron ore (as well as other minerals, as hereinafter provided for), which is or which may hereafter be found on, in, or under said lands, together with the right to construct all buildings and to make all excavations, openings, ditches, drains, railroads, wagon roads, and all other improvements upon said land and premises, which are or may become necessary or suitable in the mining or removal of the iron ore therefrom and the carrying on of mining operations thereon, and together with the right, during the continuance of this lease, to cut and use all of the timber, other than pine timber, which may be found upon said lands, free and without charge, so far as may be necessary for fuel and in the construction of buildings required in the operation of any mine
157 or mines upon said lands, and for drains, tramways, supports or shafts of or within any such mine or mines, or in connect-

ing the same with any line or lines of railroad over or upon which the said ore may be transported.

Provided, however, that the lessee, its successors or assigns, shall have the right at any time, upon thirty (30) days notice, to terminate this agreement and lease, in so far as it requires the lessee to mine ore on lands or to pay royalty therefor, or to pay taxes thereon, by giving written notice in manner as hereinafter provided, to the lessors or their legal representatives or their assigns, who shall in such case acknowledge in writing the receipt of such notice, and this lease shall treminate thirty (30) days after the giving of such notice, whether so acknowledged or otherwise. All arrearages and sums, including taxes, which may be due and payable under this lease up to the time of its termination, as set forth in such notice, shall be paid within thirty days after such termination, and the lessee, its successors or assigns, upon such termination shall immediately execute and record formal relinquishment of such lease in the office of the register of deeds of the county of St. Louis. Such notice of termination may be delivered personally to the lessors, their legal representatives or assigns, or it may be given by registered letters mailed from any post office in the United States, postage pre-paid, and addressed to the lessors, or their legal representatives or assigns, at their last known respective places of residence.

The lessors hereby further agree that the lessee, its successors and assigns, shall have the right to assign this lease or contract with others to work any mine or mines which are now or may hereafter be discovered upon said lands, or subcontract or sublet the same, at their option, with the same rights and privileges as are hereby granted to the lessee, it being expressly understood, however, that any such assignment shall not operate as a release or discharge of the lessee from the performance of the conditions of this lease, until and unless the lessors shall specifically consent to said assignment in writing.

The lessee, for itself, its successors and assigns, hereby covenants and agrees to and with the lessors that the lessee will, from and after October 1st, 1908, and on or before the tenth days of January, April, July, and October in each calendar year covered by the term of this lease, or for the period of time for which this contract and lease continues in force, pay to the lessors for all iron ore which shall be mined and removed from said lands during the three calendar months next preceding the first day of the month in which payment is to be made as aforesaid, a royalty of thirty cents per ton for all iron ore so taken out, mined, and carried away from said lands and premises, each ton in all cases to be reckoned at 2,240 pounds.

The lessee, for itself, its successors, and assigns, hereby covenants and agrees to and with the lessors that from and after the first day of October, 1908, during each and every calendar year for the period of the term of this lease, or until the surrender and assignment of the

same, in the manner hereinbefore provided, the lessee will mine and remove from the said lands (which for all and singular the purposes of this lease shall be inseparable and considered as one tract or parcel) at least fifty thousand (50,000) tons of iron ore annually, or that it will pay to the lessors an advance royalty, which shall be treated and considered as ground rent, of thirty (30) cents per gross ton on such minimum quantity each year, the same as if actually mined and removed.

It being the intention hereof that it shall be optional with the lessee either to mine, remove, or ship away iron ore from said premises during each calendar year while this lease continues in force, or, in lieu thereof, to pay the lessors an advance royalty of thirty cents per ton on said annual minimum quantity above described, the same as if actually mined and removed. The said obligation of the said lessee to pay said advance royalty of thirty cents per gross ton upon fifty thousand tons annually, or such ground rent equivalent to thirty cents per ton upon said minimum annual quantity, shall continue in force without regard to the quantity or quality of ore existing in said premises during the full term of this lease, or until the same is terminated or surrendered or assigned in the manner herein provided; and in case of the assignment of this lease in the manner herein provided the obligation to mine and pay for such annual minimum quantity of ore, as well as all other provisions of this lease, shall rest upon and bind such assignee as fully as the lessee is hereby bound.

The said ground rent or advance royalty herein agreed to be paid shall become due and be payable quarterly, at the times and in the manner hereinbefore provided for the payment for ore actually mined and shipped away, such advance royalty to begin to run on October 1", 1908.

Provided, however, that if in any one or more years, or in
159 any quarter or quarters of any year or years, more ore is thus paid for than is actually mined and removed in such year or years, or in any quarter or quarters of any such year or years, then and in such case the iron ore so paid for and not removed may be removed in any subsequent year or years, or in any subsequent quarter or quarters of such year or years, during the continuance of this lease, without other payment therefor, but such ore so permitted to be removed in any subsequent quarter or quarters of such year must be in excess of the aggregate minimum amount agreed herein to be mined and removed or paid for during all of the quarters of such year, which shall have at the time of such payment expired, and the ore so permitted to be removed in any subsequent year, in consideration of such prepayment, must be in excess of the stipulated amount agreed to be mined and removed and paid for, whether mined or not during such year, it being the intention hereof that the lessee shall not be required to make pre-payment as advance royalties or ground rent for any greater quantity of iron ore during any year of this lease than fifty thousand tons annually, unless a

greater quantity than said amount is actually mined and removed from said premises.

The lessee, its successors and assigns, at the time of making each of said payments, shall transmit to the lessors, their legal representatives or assigns, an exact, truthful statement of the amount of iron ore removed from said lands for the three calendar months for which such payment is to be made. The iron ore so taken out by the lessee, its successors or assigns, from said lands, shall be weighed by the railway company transporting the same therefrom, which weights shall determine the quantity, as between the parties hereto, prima facie.

The lessee, its successors or assigns, shall furnish to the lessors monthly statements showing the aforesaid weights. The right, however, is hereby conceded to and reserved by the lessors, by their duly authorized agents, to inspect, view, and test the correctness of the railway company's weights at any time, and in such manner as may seem proper to adopt; it being understood that any errors in these respects, when ascertained, are to be cognizable and corrected, and any such differences shall be settled and paid for at the next regular quarterly payment.

The lessee hereby covenants and agrees to conduct all its mining operations on said lands in a good, workmanlike manner, and in accordance with the requirements of good engineering and so as not to be or cause or permit any unnecessary or unusual permanent injury to the same or inconvenience or hindrance in the subsequent operation of the mine or mines thereon.

The lessee shall pay all taxes and assessments, ordinary and extraordinary, general and specific, which may be levied or assessed upon the lands demised hereby and on the iron ore mined thereon, and on all improvements and personal property thereon while this lease is in force and shall furnish the lessors with duplicate tax receipts showing the payment of any such assessments or taxes: Provided, however, that the lessee shall have the right to contest, in the courts or otherwise, the validity of any such taxes or assessments, in case it shall deem the same unjust, unequal, or excessive, or to take such other steps or proceedings as they may deem necessary to compel or secure a reduction, readjustment, or equalization thereof, before it shall be required hereunder to pay or discharge the same, or any part thereof, and at the termination of this lease, or in case the same is surrendered in manner as hereinbefore provided, the lessee further hereby agrees peaceably to surrender possession of said lands to the lessors.

The lessee hereby further covenants and agrees that while this lease is in force and until it is surrendered or assigned in the manner as herein provided it will protect the said lands and premises from all mechanics' liens or labor liens and keep the title to the same free and clear from all clouds and incumbrances arising therefrom in any way on account of its mining operations thereon or the use and occupation thereof by it, its agents, servants, or employees, or its contractors.

The lessors hereby expressly covenant and represent that the said leased lands are now owned in fee by them in the following proportions, to wit: Henry Stephens an undivided seven-ninths thereof, and Albert L. Stephens an undivided two-ninths thereof.

The several payments required hereunder to be made shall be made at the First National Bank of Duluth, Minnesota, or at any other bank or place that the lessors, their legal representatives or assigns, may from time to time in writing designate, and the bank or banks so designated shall be considered and treated as the agent or agents of the lessors, respectively, for the purpose of receiving, collecting, and receipting for such payments. The payments
161 provided in this lease to be made by the lessee shall be in gold coin of the United States of the present standard, or its equivalent.

It is mutually understood and agreed that upon the termination of this lease, whether by the acts of the parties, or either of them, or by expiration of the term, the lessee, its successors and assigns, shall have sixty (60) days in which to remove all engines, tools, machinery, railroad tracks, or structures, erected or placed by them upon said premises, provided that all taxes, royalties, or other dues have been paid and other conditions performed, but it or they shall not remove or impair any supports placed in the mine or mines, or any timber or framework necessary to the use or maintenance of the shafts or approaches to the mine or mines or the tramways within the same, and on failure within the time above specified to so remove such property, all of the same shall belong to and become the property of the lessors or their successors in interest.

The lessors expressly reserve to themselves (and the lessee hereby assents thereto) the right, by their duly authorized agents, to enter into or upon the said leased lands, mines, and premises at any time or times, to inspect or survey the same, and to measure the quantity of ore that shall have been mined or removed therefrom, not unnecessarily or unreasonably hindering or interrupting the operations of the lessee.

This lease is upon the express condition that if such royalty, or any part thereof, be and remain unpaid after the days and times above specified, and if the same remain in default for a period of sixty (60) days, or in case the lessee fails to keep any of the covenants or conditions herein expressed to be kept and performed by it, and such failure shall continue for sixty days after receiving written notice from the lessors specifying the default, neglect, or failure complained of, then and from thenceforth and in either of these events, but not otherwise, it shall be lawful for the lessors, at their option, to take possession of the said leased lands, with or without any previous process whatsoever, and to reenter and have and possess the same again as fully as if no lease had been given to the lessee; and it and all parties claiming under it shall be wholly excluded therefrom, and the lessors hereby reserve and shall at all times have, possess, and hold a lien upon all iron ore mined and upon

all improvements made upon said lands and premises by the lessee for unpaid balances hereunder.

162 In case other ores or minerals are discovered or mined on said lands by the lessee, it being hereby expressly granted the right to mine and remove the same, the royalty thereon shall be thirty-three per centum of the market value or selling price of all such ores or minerals at the market or markets therefore, less all transportation charges, which shall first be deducted from such market valye selling price and retained by the lessee, such royalty to be due and payable at the same times and in the same manner that the royalty on the iron ore shall be due and payable, and quarterly reports of the quality, grade, and quantity of such ores and minerals shall be made at the same times and in the same manner that the iron ore reports are required to be made hereunder.

The covenants, terms, and conditions of this lease shall run with the land and be in all respects binding and operative upon the heirs, legal representatives, successors, and assigns of both parties hereto.

In testimony whereof the parties of the first part have hereunto set their hands and seals, and the party of the second part has caused its corporate name and seal to be hereto affixed and these presents to be attested by its president and secretary, all the day and year first above written.

HENRY STEPHENS, [SEAL.]
SARAH M. STEPHENS, [SEAL.]
By ALBERT L. STEPHENS,
Her Attorney in Fact.
ALBERT L. STEPHENS, [SEAL.]
FRANCES H. STEPHENS. [SEAL.]
[CORPORATE SEAL.] THE ALWORTH-STEPHENS COMPANY,
By M. H. ALWORTH, *President;*
L. I. FEETHAM, *Secretary.*

Signed, sealed, and delivered in presence of—
GEORGE R. BEARD, JR.,
MARTIN G. BORGMAN,
As to the Parties of the First Part.
T. OSCAR MITCHELL,
J. L. WASHBURN,
As to the Parties of the Second Part.

163 STATE OF MICHIGAN,
County of Wayne, ss:

On this 28th day of August, 1908, before me, a notary public within and for said county, personally appeared Albert L. Stephens and Frances H. Stephens, his wife, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

[NOTARY SEAL.] MARTIN G. BORGMAN,
Notary Public, Wayne Co., Mich.

My commission expires January 13th, 1911.

STATE OF MICHIGAN,
County of Wayne, ss:

On this 28th day of August, 1908, before me, a notary public within and for said county, personally appeared Henry Stephens, to me well known to be the same person described in and who executed the foregoing instrument, and he acknowledged that he executed the same as his free act and deed.

[NOTARY SEAL.] MARTIN G. BORGMAN,
Notary Public, Wayne Co., Mich.

My commission expires January 13th, 1911.

STATE OF MICHIGAN,
County of Wayne, ss:

On this 28th day of August, 1908, before me, a notary public within and for said county, personally appeared Albert L. Stephens, to me known to be the person who executed the foregoing instrument in behalf of Sarah M. Stephens, and acknowledged that he executed the same as the free act and deed of said Sarah M. Stephens.

[NOTARY SEAL.] MARTIN G. BORGMAN,
Notary Public, Wayne Co., Mich.

My commission expires Jan. 13th, 1911.

164 STATE OF MINNESOTA,
County of St. Louis, ss:

On this 2" day of September, 1908, before me, a notary public within and for said county, personally appeared M. H. Alworth and L. I. Feetham, to me personally known, who, being by me first duly sworn, did say that they are, respectively, the president and secretary of the Alworth-Stephens Company; that the seal affixed to the foregoing instrument is the corporate seal of said company, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and the said M. H. Alworth and L. I. Feetham acknowledged the said instrument to be the free act and deed of said corporation.

[NOTARY SEAL.] OSCAR MITCHELL,
Notary Public, St. Louis County, Minnesota.

My commission expires May 25, 1914.

(Endorsed:)

Mining lease. Henry Stephens et al. to Alworth-Stephens Company.

129232. Office of register of deeds. State of Minnesota, County of St. Louis, ss: I hereby certify that the within instrument was filed in this office for record Dec. 28, 1908, at 11 a. m., and was duly recorded in Book 6 of Agrmts., page 297. M. C. Palmer, register of deeds; by Thos. Clark, deputy.

Compared, H. Reading, R.

J. L. Washburn, At City.

165 EXHIBIT G

Lease

This indenture, made this first day of September, in the year of our Lord one thousand nine hundred and eight (1908), by and between the Alworth-Stephens Company, a corporation created and existing under the laws of the State of Minnesota, as party of the first part, hereinafter called the lessor, and John S. Lutes, as party of the second part, hereinafter called the lessee,

Witnesseth that the said lessor, for and in consideration of the sum of one dollar and other valuable considerations to it in hand paid by the said lessee, the receipt whereof is hereby acknowledged, and in further consideration of the covenants, promises, and conditions hereinafter contained, to be kept and performed by the lessee, does hereby let, lease, and demise unto the lessee, his heirs, executors, administrators, and assigns, for a term of twenty-five (25) years from and after the date of this instrument, the following described lands situated in the county of St. Louis and State of Minnesota, to-wit:

The southwest quarter of the northwest quarter and the northeast quarter of the southwest quarter of section twenty-six (26) in township fifty-nine (59), north of range fifteen (15) west; and the north half of the northeast quarter of section eleven (11) in township fifty-nine (59) north, of range fourteen (14) west of the fourth principal meridian.

Said lands are hereby leased by the lessor to the lessee for the purpose of exploring for, mining, taking out, and removing therefrom the merchantable iron ore (as well as other minerals, as hereinafter provided for) which is or which may hereafter be found on, in, or under said lands, together with the right to construct all buildings and to make all excavations, openings, ditches, drains, railroads, wagon roads, and all other improvements upon said lands and premises which are or may become necessary or suitable in the mining or removal of the iron ore therefrom and the carrying on of mining operations thereon, and together with the right, during the continuance of this lease, to cut and use all of the timber, other than pine timber, which may be found upon said lands, free and without charge, so far as may be necessary for fuel and in the construction of buildings required in the operation of any mine or mines upon said lands, and for drains, tramways, supports, or shafts of or
166 within any such mine or mines, or in connecting the same with any line or lines of railroad over or upon which the said ore may be transported.

Provided, however, that the lessee, his heirs, executors, administrators, or assigns, shall have the right at any time, upon thirty (30) days' notice, to terminate this agreement and lease, in so far as it requires the lessee to mine ore on said lands or to pay royalty therefor, or to pay taxes thereon, by giving written notice in the manner

hereinafter specified to the lessor, its successors or assigns, who shall in such case acknowledge in writing the receipt of such notice, and this lease shall terminate thirty (30) days after the giving of such notice, whether so acknowledged or otherwise. All arrearages and sums, including taxes, which may be due and payable under this lease up to the time of its termination, as set forth in such notice, shall be paid within thirty days after such termination, and the lessee, his heirs, executors, administrators, or assigns, upon such termination shall immediately execute and record a formal relinquishment of such lease in the office of the register of deeds of the county of St. Louis. Such notice of termination may be delivered personally to the lessor, its successors or assigns, or it may be given by registered letters mailed from any post office in the United States, postage prepaid and addressed to the lessor, its successors or assigns, at Duluth, Minnesota.

The lessor hereby further agrees that the lessee, his heirs, executors, administrators, and assigns, shall have the right to assign this lease or contract with others to work any mine or mines which are now or may hereafter be discovered upon said lands, or subcontract or sublet the same at his option, with the same rights and privileges as are hereby granted to the lessee, it being expressly understood, however, that any such assignment shall not operate as a release or discharge of the lessee from the performance of the conditions of this lease until and unless the lessor shall specifically consent to said assignment in writing. It is contemplated that the lessee herein named may transfer this lease to a corporation either now existing or to be hereafter organized for the purpose of taking over an assignment of said lease and operating the property, and in such case the said corporation shall in such assignment assume all of the obligations of the lessee hereunder.

The lessee, for himself, his heirs, executors, administrators, and assigns, hereby covenants and agrees to and with the lessor that the lessee will from and after October 1, 1908, and on or before
167 the tenth days of January, April, July, and October in each calendar year covered by the term of this lease, or for the period of time for which this contract and lease continues in force, pay to the lessor for all iron ore which shall be mined and removed from said lands during the three calendar months next preceding the first day of the month in which payment is to be made as aforesaid, a royalty of seventy-five (75) cents per ton for all iron ore so taken out, mined, and carried away from said lands and premises, each ton in all cases to be reckoned at 2,240 pounds.

The lessee, for himself, his heirs, executors, administrators, and assigns, hereby covenants and agrees to and with the lessor that from and after October first, 1908, during each and every calendar year for the period of the term of this lease, or until the surrender and assignment of the same, in the manner hereinbefore provided, he will mine and remove from said lands (which for all and singu-

lar the purposes of this lease shall be inseparable and considered as one tract or parcel) at least fifty thousand (50,000) tons of iron ore annually, or that it will pay to the lessor an advance royalty, which shall be treated and considered as ground rent, of seventy-five cents per gross ton on such minimum quantity each year, the same as if actually mined and removed, said advance royalty or ground rent to begin to run on October first, 1908.

It being the intention hereof that it shall be optional with the lessee either to mine, remove, or ship away iron ore from said premises during each calendar year while this lease continues in force or in lieu thereof to pay the lessor an advance royalty of seventy-five cents per ton on said annual minimum quantity above described, the same as if actually mined and removed. The said obligation of the said lessee to pay said advance royalty of seventy-five cents per ton upon fifty thousand tons annually, or such ground rent equivalent to seventy-five cents per ton upon said minimum annual quantity, shall continue in force, without regard to the quantity or quality of ore existing in said premises, during the full term of this lease or until the same is terminated or surrendered or assigned, in the manner herein provided; and in case of the assignment of this lease in the manner herein provided the obligation to mine and pay for such annual minimum quantity of ore, as well as all other provisions of this lease, shall rest upon and bind such assignee as fully as the lessee is hereby bound.

The said ground rent or advance royalty herein agreed to
168 be paid shall become due and be paid quarterly at the times and in the manner hereinbefore provided for the payment for ore actually mined and shipped away.

Provided, however, that if any one or more years, or in any quarter or quarters of any year or years, more ore is thus paid for than is actually mined and removed in such year or years, or in any quarter or quarters of such year or years, then in such case the iron ore so paid for and not removed may be removed in any subsequent year or years, or in any subsequent quarter or quarters of such year or years, during the continuance of this lease, without other payment therefor; but such ore so permitted to be removed in any subsequent quarter or quarters of such year must be in excess of the aggregate minimum amount agreed herein to be mined and removed or paid for during all of the quarters of such year, which shall have at the time of such payment expired; and the ore so permitted to be removed in any subsequent year in consideration of such pre-payment must be in excess of the stipulated amount agreed to be mined and removed and paid for, whether mined or not, during such year, it being the intention hereof that the lessee shall not be required to make prepayment as advance royalties or ground rent for any greater quantity of iron ore during any year of this lease than fifty thousand tons annually unless a greater quantity than said amount is actually mined and removed from said premises.

The lessee, his heirs, executors, administrators, and assigns at the time of the making of each of said payments shall transmit to the lessor, its successors, or assigns, an exact, truthful statement of the amount of iron ore removed from said lands for the three calendar months for which such payment is to be made. The iron ore so taken out by the lessee, his heirs, executors, administrators, or assigns, from said lands, shall be weighed by the railway company transporting the same therefrom, which weights shall determine the quantity as between the parties hereto, prima facie.

The lessee, his heirs, executors, administrators, or assigns, shall furnish to the lessor monthly statements showing the aforesaid weights. The right, however, is hereby conceded to and reserved by the said lessor, by its duly authorized agent, to inspect, view, and test the correctness of the railway company's weights at any time and in such manner as may seem proper to adopt; it being understood that any errors in these respects, when ascertained, are
169 to be cognizable and corrected, and any such differences shall be settled and paid for at the next regular quarterly payment.

The lessee hereby covenants and agrees to conduct all of his mining operations on said lands in a good and workmanlike manner, and in accordance with the requirements of good engineering and so as not to be or cause or permit any unnecessary or unusual permanent injury to the same or inconvenience or hindrance in the subsequent operation of the mine or mines thereon.

The lessee shall pay all taxes and assessments, ordinary and extraordinary, general and specific, which may be levied or assessed upon the said lands demised hereby and on the iron ore mined thereon and on all improvements and personal property thereon while this lease is in force, and shall furnish the lessor with duplicate tax receipts showing the payment of any such assessments or taxes: Provided, however, that the lessee shall have the right to contest, in the courts or otherwise, the validity of any such taxes or assessments in case it shall deem the same unjust, unequal, or excessive, or to take such other steps or proceedings as he may deem necessary to compel or secure a reduction, readjustment, or equalization thereof, before he shall be required hereunder to pay or discharge the same, or any part thereof; and at the termination of this lease, or in case the same is surrendered in manner as hereinbefore provided, the lessee hereby further agrees peaceably to surrender possession of said lands to the lessor.

The lessee hereby further covenants and agrees that while this lease is in force and until it is surrendered or assigned in the manner as herein provided he will protect the said lands and premises from all mechanics' liens or labor liens and keep the title to the same free and clear from all clouds and incumbrances arising therefrom or in any way on account of his mining operations thereon or the use or occupation thereof by him, his agents, servants, or employees, or his contractors.

The lessor hereby expressly covenants and represents that it has good right and lawful authority to make this lease.

The several payments required hereunder to be made shall be made at the Duluth Savings Bank, Duluth, Minnesota, or at any other bank or place that the lessor, its successors or assigns, may from time to time in writing designate, and the bank or banks so designated shall be considered and treated as the agent or agents of the lessor, for the purpose of receiving, collecting, and receipting for such payments. The payments provided in this lease to be made by the lessee shall be in gold coin of the United States of the present standard, or its equivalent.

It is mutually understood and agreed that upon the termination of this lease, whether by the acts of the parties, or either of them, or by expiration of the term, the lessee, his heirs, executors, administrators, and assigns, shall have sixty (60) days in which to remove all engines, tools, machinery, railroad tracks or structures erected or placed by them upon said premises, provided that all taxes, royalties, or other dues have been paid and other conditions performed: but he or they shall not remove or impair any supports placed in the mine or mines or any timber or framework necessary to the use or maintenance of the shafts or approaches to the mine or mines or the tramways within the same, and on failure within the time above stated to so remove such property all of the same shall belong to and become the property of the lessor, its successors or assigns.

The lessor expressly reserves to itself (and the lessee hereby assents thereto) the right by its duly authorized agents to enter into or upon the said leased lands, mines, and premises at any time or times to inspect or survey the same and to measure the quantity of ore that shall have been mined or removed therefrom, not unnecessarily or unreasonably hindering or interrupting the operations of the lessee.

This lease is upon the express condition that if such royalty or any part thereof be and remain unpaid after the days and times above specified, and if the same remain in default for a period of sixty (60) days, or in case the lessee fails to keep any of the covenants or conditions herein expressed to be kept and performed by him, and such failure shall continue for sixty days after receiving written notice from the lessor specifying the default, neglect, or failure complained of, then and from thence forth and in either of these events, but not otherwise, it shall be lawful for the lessor, at its option, to take possession of the said leased lands, with or without any previous process whatever, and to re-enter and have and possess the same again as fully as if no lease had been given to the lessee, and he and all parties claiming under him shall be wholly excluded therefrom, and the lessor hereby reserves and shall at all times have, possess, and hold a lien upon all iron ore mined and upon all improvents made upon said lands and premises by the lessee for unpaid balances hereunder.

171 In case other ores or minerals are discovered or mined on said lands by the lessee, he being hereby expressly granted the right to mine and remove the same, the royalty thereon shall be thirty-three per centum of the market value or selling price of all such ores or minerals at th' market or markets therefor, less all transportation charges, which shall first be deducted from such market value or selling price and retained by the lessee, such royalty to be due and payable at the same times and in the same manner that the royalty on the iron ore shall be due and payable, and quarterly reports of the quantity, grade, and quality of such ores and minerals shall be made at the same times and in the same manner that the iron ore reports are required to be made hereunder.

The covenants, terms, and conditions of this lease shall run with the land and be in all respects binding and operative upon the heirs, legal representatives, successors and assigns of both parties hereto.

In testimony whereof, the party of the first part has caused its corporate name and seal to be hereto affixed and this instrument to be executed by its president and secretary and the party of the second part has hereunto set his hand and seal, all the day and year first above written.

THE ALWORTH-STEPHENS COMPANY,
By M. H. ALWORTH, *President.*
[CORPORATE SEAL.]
L. I. FEETHAM, *Secretary.*
JOHN S. LUTES. [SEAL.]

Signed, sealed, and delivered in presence of—

OSCAR MITCHELL,
J. L. WASHBURN,
As to first party.
M. W. ALWORTH,
P. F. HEIMICK,
As to second party.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 2nd day of September, 1908, before me a notary public within and for said county personally appeared M. H. Al-
172 worth and L. I. Feetham, to me personally known who being by me first duly sworn did say that they are respectively the president and secretary of the Alworth-Stephens Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and the said M. H. Alworth and L. I. Feetham acknowledged the said instrument to be the free act and deed of said corporation.

[NOTARY SEAL.] OSCAR MITCHELL,
Notary Public, St. Louis Co., Minn.

My commission expires May 25, 1914.

STATE OF MINN.,
County of St. Louis, ss:

On this 11 day of September, 1908, before me a notary public within and for said county personally appeared John S. Lutes to me well known to be the same person described in and who executed the foregoing instrument and he acknowledged that he executed the same as his free act and deed.

[NOTARY SEAL.] P. F. HEIMICK,
Notary Public, St. Louis County, Minn.

My commission expires Sep. 10, 1914.

EXHIBIT G-1

No. 146639.

Filed Dec. 31, 1909, at 11.30 a. m. in Book of Agreements No. 10, p. 241.

Memorandum of agreement, made and entered into this 1st day of February, 1909, by and between John S. Lutes and Julia H. Lutes, his wife, as parties of the first part, and the Perkins Mining Company a corporation of the State of Minnesota, party of the second part.

Whereas, heretofore, the parties of the first part hereto entered into a certain lease for mining purposes with the Alworth-Stephens Company, said mining lease covering the following lands situate in the county of St. Louis, State of Minnesota, to-wit:

The southwest quarter of the northwest quarter, and the northeast quarter of the southwest quarter of section twen-
173 ty-six (26) in township fifty-nine (59), north of range fifteen (15) west; and the north half of the northeast quarter of section eleven (11) in township fifty-nine (59) north, of range fourteen (14) west of the fourth principal meridian, and bearing date the first (1) day of September, 1908, to which indenture of lease reference is hereby made for greater certainty.

Now this indenture witnesseth, that, the said parties of the first part for the valuable consideration to them respectively in hand paid by the said party of the second part, the receipt and sufficiency whereof is hereby acknowledged, do hereby sell, assign, transfer, and set over unto the said party of the second part, its successors and assigns, all their right, title, and interest in and to the said mining lease above described, and in and to said pieces and parcels of land by virtue thereof.

And the party of the second part in consideration hereof for itself, its successors, and assigns, does hereby covenant and agree to end with the said parties of the first part and their respective heirs, executors, and administrators, that it will fully and faithfully perform and carry out all the covenants, terms, and conditions of said mining lease *ot* the same extent in all respects as the parties of the first part hereto are bound for the performance thereof.

In witness whereof, the part' of the second part has caused these presents to be signed by its president and its corporate seal to be

hereunto affixed, duly attested by its secretary, and the parties of the first part have hereunto set their hands and seals the day and year first above written.

(Perkins Mining Company corporate seal.)

JOHN S. LUTES. [SEAL.]
JULIA H. LUTES. [SEAL.]
PERKINS MINING COMPANY.
By JOSEPH SELLWOOD, *President*.

Attest: R. M. SELLWOOD, *Secretary*.

Signed, sealed, and delivered in presence of—
A. H. CRASSWELLER,
FRANK CRASSWELLER,
As to J. S. & J. H. Lutes.

174 STATE OF MINNESOTA,
County of St. Louis, ss:

On this 2nd day of December, 1909, before me personally appeared John S. Lutes and Julia H. Lutes, his wife, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they severally executed the same as their free act and deed respectively.

A. H. CRASSWELLER,
Notary Public, St. Louis County, Minnesota.

My commission expires March 22, 1910.
(Notarial seal, St. Louis County, Minn.)

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 31 day of January, 1909, before me, appeared Joseph Sellwood, to me personally known, who being by me duly sworn did say that he is the president of the Perkins Mining Company, that the seal affixed to said instrument is the corporate seal of said corporation, that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said Joseph Sellwood acknowledged said instrument to be the free act and deed of said corporation.

HENRY MAXEINER,
Notary Public, St. Louis County, Minnesota.

My commission expires Aug. 6, 1913.
(Notarial seal, St. Louis County, Minn.)

175 EXHIBIT H

Opinion

DULUTH, MINNESOTA, *July 13, 1908.*

H. G. DALTON,
Trustee, Cleveland, Ohio.

GENTLEMEN: We hereby grant you an option until August 1st, 1909, for a mining lease to run for a period of forty-nine (49) years

on any and all of the following-described lands in St. Louis County, Minnesota:

The southwest quarter of the southwest quarter, the south half of the southeast quarter of the southwest quarter, the east half of the southeast quarter, and the southwest quarter of the southeast quarter of section thirty-three (33) in township fifty-nine (59) north, of range fifteen (15) west of the fourth principal meridian, and the northeast quarter of the northeast quarter and the northwest quarter of the northwest quarter of section four (4) in township fifty-eight (58) north, of range fifteen (15) west of the fourth principal meridian.

The conditions on which this option is given are:

That you shall within thirty (30) days commence the work of exploring and testing the said lands for minerals, and shall thereafter prosecute continuously such work, with a complete equipment of men and machinery and at least two drills, until this option is surrendered or a lease of said premises, or any part thereof, is taken, and shall furnish us from time to time, at least once in each month, reports of the results of such exploration, samples of ore and other rock that may be found, and copies of all reports of assayers on the quality of such ore, and allow us access to the premises for examination of the work; and that any suspension of such work during the life of this option shall work a forfeiture thereof.

Should you elect at any time during the life of this option to take a lease of said land upon one or more forty-acre tracts thereof, we agree to execute to you such lease, substantially according to the form hereto attached, for each and every forty-acre tract so selected, or for as many forty-acre tracts as you may desire in one lease. You may take such lease on one or more forty-acre tracts and continue your explorations for the remainder of the period of this option upon the residue, if you so elect.

176 Such lease or leases shall provide for the payment of a royalty upon iron ore mined and shipped from the leased premises of sixty (60) cents per ton of 2,240 pounds at the quarterly dates specified in the said form of lease attached, and for the payment of a minimum annual royalty at such quarterly dates at said rate of sixty cents per ton upon a minimum quantity of fifty thousand (50,000) tons upon each forty-acre tract leased, whether ore be mined and shipped or not, and without regard to the quantity or quality of such ore.

[CORPORATE SEAL.] THE ALWORTH-STEPHENS COMPANY,
By M .H. ALWORTH, *President*,
Attest: L. I. FEETHAM, *Secretary*.

The foregoing option is hereby accepted.

H. G. DALTON, *Trustee*.

This indenture, made this ____ day of ------ in the year of our Lord one thousand nine hundred and ____, by and between the Alworth-Stephens Company, a corporation organized and existing

under the laws of the State of Minnesota, as party of the first part, hereinafter called the lessor, and H. G. Dalton, trustee, of Cleveland, Ohio, as party of the second part, hereinafter designated as the lessee.

Witnesseth, that the said lessor, for and in consideration of the sum of one dollar, and other valuable considerations to them in hand paid by the lessee, the receipt whereof is hereby acknowledged, and in further consideration of the covenants, promises, and conditions hereinafter contained, to be kept and performed by the lessee, does hereby let, lease, and demise unto the lessee, his successors and assigns, for a term of forty-nine (49) years from and after the date of this instrument, the following-described lands situated in the county of St. Louis and State of Minnesota, to-wit:

The southwest quarter of the southwest quarter, the south half of the southeast quarter of the southwest quarter, the east half of the southeast quarter, and the southwest quarter of the southeast quarter of section thirty-three (33) in township fifty-nine (59) north, of range fifteen (15) west of the fourth principal meridian, and the northeast quarter of the northeast quarter and the northwest quarter of the northwest quarter of section four (4) in township
177 fifty-eight (58) north, of range fifteen (15) west of the fourth principal meridian.

Said lands are hereby leased by the lessor to the lessee for the purpose of exploring for, mining, taking out, and removing therefrom the merchantable iron ore (as well as other minerals, as hereinafter provided for), which is or which may hereafter be found on, in, or under said lands, together with the right to construct all buildings and to make all excavations, openings, ditches, drains, railroads, wagon roads, and all other improvements upon said lands and premises which are or may become necessary or suitable for the mining or removing of the iron ore therefrom, and the carrying on of mining operations thereon, and together with the right, during the continuance of this lease, to cut and use all of the timber, other than pine timber, which may be found upon said lands, free and without charge, so far as may be necessary for fuel and in the construction of buildings required in the operation of any mine or mines upon said lands, and for drains, tramways, supports, or shafts of or within any such mine or mines, or in connecting the same with any line or lines of railroad over or upon which the said ore may be transported.

Provided, however, that the lessee, his successors, or assigns shall have the right at any time, upon thirty days' notice, to terminate this agreement and lease, in so far as it requires the lessee to mine ore on said lands or to pay royalties therefor, or to pay taxes thereon, by giving written notice in manner as hereinafter provided to the lessor or its legal representatives or its assigns, who shall, in such case, acknowledge in writing the receipt of such notice, and this lease

shall terminate thirty days after the giving of such notice, whether so acknowledged or otherwise. All arrearages and sums, including taxes, which may be due and payable under this lease up to the time of its termination as set forth in such notice, shall be paid within thirty days after such termination, and the lessee, his successors, or assigns, upon such termination, shall immediately execute and record formal relinquishment of such lease in the office of the register of deeds of the county of St. Louis. Such notice of termination may be delivered personally to the lessor, its legal representatives, or assigns, or it may be given by registered letters mailed from any post office in the United States, postage prepaid, and addressed to the lessor or its legal representatives or assigns at their last known place of residence.

178 The lessor hereby further agrees that the lessee, his successors, and assigns shall have the right to assign this lease, or contract with others to work any mine or mines which are now or may hereafter be discovered upon said lands, or subcontract or sublet the same, at his option, with the same rights and privileges as are hereby granted to the lessee, it being expressly understood, however, that any such assignment shall not operate as a release or discharge of the lessee from the performance of the conditions of this lease until and unless the lessor shall specifically consent to said assignment in writing.

The lessee, for himself, his successors, and assigns, hereby covenants and agrees to and with the lessor that the lessee will from and after the date hereof and on or before the tenth days of January, April, July, and October, in each calendar year covered by the terms of this lease, or for the period of time for which this contract and lease continues in force, pay to the lessor for all iron ore which shall be mined and removed from said lands during the three calendar months next preceeding the first day of the month in which payment is to be made as aforesaid, a royalty of sixty cents per ton for all iron ore so taken out, mined and carried away from said lands and premises, each ton in all cases to be reckoned at 2,240 pounds.

The lessee, for himself, his successors and assigns, hereby covenants and agrees to and with the lessor that from and after the date of this lease, during each and every calendar year for the period of the term of this lease, or until the surrender or assignment of the same, in the manner herein provided, the lessee will mine and remove from the said lands (which for all and singular the purposes of this lease shall be inseparable and considered as one tract or parcel) at least_____thousands tons annually of iron ore, or that he will pay to the lessor an advance royalty, which shall be treated and considered as ground rent of sixty cents per gross ton on such minimum quantity each year, the same as if actually mined and removed;

It being the intention hereof that it shall be optional with the lessee either to mine, remove or ship away iron ore from said premises

during each calendar year while this lease continues in force, or, in lieu thereof, to pay the lessor an advance royalty of sixty cents per ton on said annual minimum quantity above described the same as if actually mined and removed. The said obligation of the said lessee to pay said advance royalty of sixty cents per gross ton upon ------tons annually, or such ground rent equivalent to sixty cents per ton upon said minimum annual quantity, shall continue in force without regard to the quantity or quality of ore existing in said premises, during the full term of this lease, or until the same is terminated or surrendered or assigned in the manner herein provided; and in case of the assignment of this lease in the manner herein provided, the obligation to mine and pay for such annual minimum quantity of ore, as well as all other provisions of this lease, shall rest upon and bind such assignee as fully as the lessee is hereby bound.

The said ground rent or advance royalty herein agreed to be paid shall become due and be paid quarterly at the times and in the manner as hereinbefore provided for the payment for ore actually mined and shipped away: Provided, however, that if in any one or more years, or in any quarter or quarters of any year or years, more ore is thus paid for than is actually mined and removed in such year or years, or in any quarter or quarters of any such year or years, then and in such case the iron ore so paid for and not removed may be removed in any subsequent year or years, or in any subsequent quarter or quarters of such year or years, during the continuance of this lease, without other payment therefor, but such ore so permitted to be removed in any subsequnet quarter or quarters of such year must be in excess of the aggregate minimum amount agreed herein to be mined and removed or paid for during all of the quarters of such year, which shall have at the time of such payment expired, and the ore so permitted to be removed in any subsequent year, in consideration of such prepayment, must be in excess of the stipulated amount agreed to be mined and removed and paid for, whether mined or not, during such year, it being the intention hereof that the lessee shall not be required to make pre-payment as advance royalties or ground rent for any greater quantity of iron ore during any year of this lease than ------ tons annually, unless a greater quantity than said amount is actually mined and removed from said premises.

The lessee, his successors, and assigns, at the time of making
180 each of said payments shall transmit to the lessor, its legal representatives or assigns, an exact truthful statement of the amount of iron ore removed from said lands for the three calendar months for which such payment is to be made. The iron ore so taken out by the lessee, his successors or assigns, from said lands shall be weighed by the railroad company transporting the same therefrom, which weights shall determine the quantity as between the parties hereto prima facie.

The lessee, his successors or assigns, shall furnish to the lessor monthly statement showing the aforesaid weights. The right, however, is hereby conceded to and reserved by the said lessor, by its

duly authorized agents, to inspect, view, and test the correctness of the railroad company's weights at any time, and in such manner as may seem proper to adopt; it being understood that any errors in these respects, when ascertained, are to be cognizable and corrected and any such differences shall be settled and paid for at the next regular quarterly payment.

The lessee hereby covenants and agrees to conduct all his mining operations on said lands in a good, workmanlike manner, and in accordance with the requirements of good engineering and so as not to be or cause or permit any unecessary or unusual permanent injury to the same or inconvenience or hindrance in the subsequent operation of the mine or mines thereon.

The lessee shall pay all taxes and assessments, ordinary and extraordinary, general and specific, which may be levied or assessed upon the lands demised hereby and on the iron ore mined thereon, and on all improvements and personal property thereon, while this lease is in force, and shall furnish the lessor with duplicate tax receipts showing the payment of any such assessments or taxes: provided, however, that the lessee shall have the right to contest, in the courts or otherwise, the validity of any such taxes or assessments, in case it shall deem the same unjust, unequal or excessive, or to take such other steps or proceedings as they deem necessary to compel or secure a reduction, re-adjustment or equalization thereof, before he shall be required hereunder to pay or discharge the same, or any part thereof, and at the termination of this lease, or in case the same is surrendered in manner as hereinbefore provided, the lessee further hereby agrees peaceably to surrender possession of said lands to the lessor.

181 The lessee hereby further covenants and agrees that, while this lease is in force and until it is surrendered or assigned in manner as herein provided, he will protect the said lands and premises from all mechanics liens or labor liens and keep the title to the same free and clear from all clouds and encumbrances arising therefrom in any way on account of his mining operations thereon or the use and occupation thereof by him, his agents, servants or employes, or his contractors.

The lessor hereby expressly covenants and represents that the said leased lands are now owned in fee by Henry Stephens an undivided seven-ninths thereof, and Albert L. Stephens an undivided two-ninths thereof.

The payments required hereunder to be made shall be made at the _____ or at any other bank or place that the lessor, its legal representative or assigns may from time to time in writing designate, and the bank so designated shall be considered and treated as the agent of the lessor, for the purpose of receiving, collecting and receipting for such payments. The payments provided in this lease to be made by the lessee, shall be made in gold coin of the United States of the present standard, or its equivalent.

It is mutually understood and agreed that upon the termination of this lease whether by the acts of the parties or either of them, or by expiration of the term, the lessee, his successors and assigns, shall have sixty days in which to remove all engines, tools, machinery, railroad tracks or structures erected or placed by him upon said premises, provided that all taxes, royalties or other dues have been paid and other conditions performed, but he or they shall not remove or impair any supports placed in the mine or mines, or any timber or frame work necessary to the use or maintenance of the shafts or approaches to the mine or mines or the tram-ways within the same, and on failure within the time above specified to so remove such property, all of the same shall belong to and become the property of the lessor or its successors in interest.

The lessor expressly reserves to itself (and the lessee hereby assents thereto) the right, by its duly authorized agents, to enter into or upon said leased lands, mines and premises at any time or times, to inspect or survey the same and to measure the quantity of ore that shall have been mined or removed therefrom, not unnecessarily or unreasonably hindering or interrupting the operation of the lessee.

182 This lease is upon the express condition that if such royalty, or any part thereof, be and remain unpaid after the days and times above specified and if the same remain in default for a period of sixty days, or in case the lessee fails to keep any of the covenants or conditions herein expressed to be kept and performed by it, and such failure shall continue for sixty days after receiving written notice from the lessor specifying the default, neglect or failure complained of, then and from thenceforth and in either of these events, but not otherwise, it shall be lawful for the lessor, at its option, to take possession of the said leased lands, with or without any previous process whatsoever, and to re-enter and have and possess the same again as fully as if no lease had been given to the lessee, and he and all parties claiming under it shall be wholly excluded therefrom, and the lessor hereby reserves and shall at all times have, possess and hold a lien upon all iron ore mined and upon all improvements made upon said lands and premises by the lessee, for unpaid balances hereunder.

In case other ores or minerals are discovered or mined on said lands by the lessee, he being hereby expressly granted the right to mine and remove the same, the royalty thereon shall be thirty-three per centum of the market value or selling price of all such ores or minerals at the market or markets therefor, less all transportation charges, which shall first be deducted from such market value or selling price and retained by the lessee, such royalty to be due and payable at the same times and in the same manner that the royalty on the iron ore shall be due and payable, and quarterly reports of the quality, grade and quantity of such ores and minerals shall be made at the same times and in the same manner that the iron ore reports are required to be made hereunder.

The covenants, terms and conditions of this lease shall run with the land and be in all respects binding and operative upon the heirs, legal representatives, successors and assigns of both parties hereto.

In testimony whereof, the party of the first part has caused its corporate name and seal to be hereto affixed and these pres-
183 ents to be attested by its president and secretary, and the party of the second part has hereunto set his hand and seal, all the day and year first above written.

THE ALWORTH-STEPHENS COMPANY,
By ---------- *President.*
Attest: ---------- *Secretary.*

Signed, sealed and delivered in presence of—

EXHIBIT I.

Lease

This indenture, made this twelfth day of March in the year of our Lord one thousand nine hundred and nine, by and between Henry Stephens and Sarah M. Stephens, his wife, Albert L. Stephens and Francis H. Stephens, his wife, as parties of the first part, hereinafter called the lessors, and the Alworth-Stephens Company, a corporation created and existing under the laws of the State of Minnesota, as party of the second part, hereinafter designated as the lessee,

Witnesseth, that the said lessors, for and in consideration of the sum of one dollar, and other valuable considerations to them in hand paid by the lessee, the receipt whereof is hereby acknowledged, and in further consideration of the covenants, promises and conditions hereinafter contained, to be kept and performed by the lessee, do hereby let, lease and demise unto the lessee, its successors and assigns, for a term of fifty (50) years from and after the date of this instrument, the following described lands situated in the county of St. Louis and State of Minnesota, to wit:

184 The northwest quarter of northwest quarter (NW. ¼ of NW.¼) of section four (4), township fifty-eight (58), north of range fifteen (15), west of the fourth principal meridian.

Said lands are hereby leased by the lessors to the lessee for the purpose of exploring for, mining, taking out and removing therefrom the merchantable iron ore (as well as other minerals, as hereinafter provided for), which is or which may hereafter be found on, in or under said lands, together with the right to construct all buildings and to make all excavations, openings, ditches, drains, railroads, wagon roads and all other improvements upon said lands and premises, which are or may become necessary or suitable for the mining

or removing of the iron ore therefrom, and the carrying on of mining operations thereon, and together with the right, during the continuance of this lease, to cut and use all of the timber, other than pine timber, which may be found upon said lands, free and without charge, so far as may be necessary for fuel and in the construction of buildings required in the operation of any mine or mines upon said lands, and for drains, tram-ways, supports or shafts of or within any such mine or mines, or in connecting the same with any line or lines of railroad over or upon which the said ore may be transported.

Provided, however, that the lessee, its successors or assigns, shall have the right at any time, upon thirty days' notice to terminate this agreement and lease, in so far as it requires the lessee to mine ore on said lands or to pay royalty therefor, or to pay taxes thereon, by giving written notice in manner as hereinafter provided, to the lessors or their legal representatives or their assigns, who shall, in such case, acknowledge in writing the receipt of such notice, and this lease shall terminate thirty days after the giving of such notice, whether so acknowledged or otherwise. All arrearages and sums, including taxes, which may be due and payable under this lease up to the time of its termination as set forth in such notice, shall be paid within thirty days after such termination, and the lessee, its successors or assigns, upon such termination shall immediately execute and record formal relinquishment of such lease in the office of the register of deeds of the county of St. Louis. Such notice of termination may be delivered personally to the lessors, their legal representatives or assigns, or it may be given by registered letters mailed from any post office in the United States, postage
185 prepaid, and addressed to the lessors, or their legal representatives or assigns, at their last known respective places of residence.

The lessors hereby further agree that the lessee, its successors and assigns shall have the right to assign this lease, or contract with others to work any mine or mines which are now or may hereafter be discovered upon said lands, or sub-contract or sub-let the same, at their option, with the same rights and privileges as are hereby granted to the lessee, it being expressly understood, however, that any such assignment shall not operate as a release or discharge of the lessee from the performance of the conditions of this lease, until and unless the lessors shall specifically consent to said assignment in writing.

The lessee, for its self, its successors and assigns, hereby covenants and agrees to and with the lessors that the lessee will from and after the date hereof and on or before the tenth days of January, April, July and October, in each calendar year covered by the term of this lease, or for the period of time for which this contract and lease continues in force, pay to the lessors for all iron ore which shall be mined and removed from said lands during the three calendar months next preceeding the first day of the month in which payment

is to be made as aforesaid, a royalty of thirty cents per ton for all iron ore so taken out, mined and carried away from said lands and premises, each ton in all cases to be reckoned at 2,240 pounds.

The lessee, for itself, its successors and assigns, hereby covenants and agrees to and with the lessors that from and after the date of this lease, during each and every calendar year for the period of the term of this lease, or until the surrender or assignment of the same, in the manner herein provided, the lessee will mine and remove from the said lands (which for all and singular the purposes of this lease shall be inseparable and considered as one tract or parcel) at least twenty-five thousand (25,000) tons annually of iron ore, or that it will pay to the lessors an *a* advance royalty, which shall be treated and considered as ground rent of thirty cents per gross ton on such minimum quantity each year, the same as if actually mined and removed;

It being the intention hereof that it shall be optional with the lessee either to mine, remove or ship away iron ore from said premises during each calendar year while this lease continues in force, or, in lieu thereof, to pay the lessors an advance royalty of thirty cents per ton on said annual minimum quantity above described,
186 the same as if actually mined and removed. The said obligation of the lessee to pay said advance royalty of thirty cents per gross ton upon twenty-five thousand (25,000) tons annually, or such ground rent equivalent to thirty cents per ton upon said minimum annual quantity, shall continue in force without regard to the quantity or quality of ore existing in said premises, during the full term of this lease, or until the same is terminated or surrendered or assigned in the manner herein provided; and in case of the assignment of this lease in the manner herein provided, the obligation to mine and pay for such annual minimum quantity of ore, as well as all other provisions of this lease, shall rest upon and bind such assignee as fully as the lessee is hereby bound.

The said ground rent or advance royalty herein agreed to be paid, shall become due and be paid quarterly, at the time and in the manner as hereinbefore provided for the payment for ore actually mined and shipped away; Provided, however, that if in any one or more years, or in any quarter or quarters of any year or years, more ore is thus paid for than is actually mined and removed in each year or years, or in any quarter or quarters of any such year or years, then and in such case the iron ore so paid for and not removed, may be removed in any subsequent quarter or quarters of such year or years, durin' the continuance of this lease, without other payment therefor, but such ore so permitted to be removed in any subsequent quarter or quarters of such year must be in excess of the aggregate minimum amount agreed herein to be mined and removed or paid for during all of the quarters of such year, which shall have, at the time of such payment, expired, and the ore so permitted to be removed in any subsequent year, in consideration of such pre-payment, must be in excess of the stipulated amount agreed to be mined and removed

and paid for, whether mined or not, during such year, it being the intention hereof that the lessee shall not be required to make prepayment as advance royalties or ground rent, for any greater quantity of iron ore during any year of this lease, than twenty-five thousand (25,000) tons annually, unless a greater quantity than said amount is actually mined and removed from said premises.

The lessee, its successors, and assigns, at the time of making each of said payments, shall transmit to the lessors, their legal representatives or assigns, an exact, truthful statement of the amount of iron ore removed from said lands for the three calendar months
187 for which such payment is to be made. The iron ore so taken out by the lessee, its successors or assigns, from said lands, shall be weighed by the railroad company transporting the same therefrom, which weights shall determine the quantity as between the parties hereto prima facie.

The lessee, its successors or assigns, shall furnish to the lessors, monthly statements showing the aforesaid weights. The right, however, is hereby conceded to and reserved by the said lessors, by their duly authorized agents, to inspect, view and test the correctness of the railroad company's weights at any time, and in such manner as may seem proper to adopt; it being understood that any errors in these respects, when ascertained, are to cognizable and corrected and any such differences shall be settled and paid for at the next regular quarterly payment.

The lessee hereby covenants and agrees to conduct all its mining operations on said lands in a good, workmanlike manner, and in accordance with the requirements of good engineering and so as not to be or cause or permit any unnecessary or unusual permanent injury to the same or inconvenience or hindrance in the subsequent operation of the mine or mines thereon.

The lessee shall pay all taxes and assessments, ordinary and extraordinary, general and specific, which may be levied or assessed upon the lands demised hereby and on the iron ore mined thereon, and on all improvements and personal property thereon, while this lease is in force, and shall furnish the lessors with duplicate tax receipts showing the payment of any such assessments or taxes; provided, however, that the lessee shall have the right to contest, in the courts or otherwise, the validity of any such taxes or assessments, in case it shall deem the same unjust, unequal or excessive, or to take such other steps or proceedings as they may deem necessary to compel or secure a reduction, re-adjustment or equalization thereof, before he shall be required hereunder to pay or discharge the same, or any part thereof, and at the termination of this lease, or in case the same is surrendered in manner as hereinbefore provided, the lessee further hereby agrees peaceably to surrender possession of said lands to the lessors.

The lessee hereby further covenants and agrees that, while this lease is in force and until it is surrendered or assigned in manner as

herein provided, it will protect the said lands and premises
188 from all mechanics liens or labor liens and keep the title to the same free and clear from all clouds and encumbrances arising therefrom in any way on account of its mining operations thereon or the use and occupation thereof by it, its agents, servants or employes, or its contractors.

The lessors hereby expressly covenant and represent that the said leased lands are now owned in fee by them in the following proportions, to-wit: Henry Stephens an undivided seven-ninths thereof, and Albert L. Stephens an undivided two-ninths thereof.

The several payments required hereunder to be made shall be made at the First National Bank or Duluth or at any other bank or place that the lessors, their legal representative or assigns may be from time to time in writing designate, and the bank or banks so designated shall be considered and treated as the agent or agents of the lessors respectively, for the purpose of receiving, collecting and receipting for such payments. The payments provided in this lease to be made by the lessee, shall be made in gold coin of the United States of the present standard, or its equivalent.

It is mutually understood and agreed that upon the termination of this lease whether by the acts of the parties or either of them, or by expiration of the term, the lessee, its successors and assigns, shall have sixty days in which to remove all engines, tools, machinery, railroad tracks or structures erected or placed by them upon said premises, provided that all taxes, royalties or other dues have been paid and other conditions performed, but it or they shall not remove or impair any supports placed in the mine or mines, or any timber or frame work necessary to the use or maintenance of the shafts or approaches to the mine or mines or the tram-ways within the same and on failure within the time above specified to so remove such property, all of the same shall belong to and become the property of the lessors or their successors in interest.

The lessors expressly reserve to themselves (and the lessee hereby assents thereto) the right, by their duly authorized agents, to enter into or upon said leased lands, mines and premises at any time or times, to inspect or survey the same and to measure the quantity of ore that shall have been mined or removed therefrom, not unnecessarily or unreasonably hindering or interrupting the operations of the lessee.

This lease is upon the express condition that if such royalty, or any part thereof, be and remain unpaid after the days and times above specified and if the same remain in default for a period of sixty days, or in case the lessee fails to keep any of the covenants or conditions herein expressed to be kept and performed by it, and such failure shall continue for sixty days after receiving written notice from the lessors specifying the default, neglect or failure complained of, then and from thenceforth and in either of these events, but not otherwise, it shall be lawful for the lessors, at their option to take possession of

the said leased lands, either with or wihtout any previous process whatsoever, and to re-enter and have and possess the same again as fully as if no lease had been given to the lessee, and it and all parties claiming under it shall be wholly excluded therefrom, and the lessors hereby reserve and shall at all times have, possess and hold a lien upon all iron ore mined and upon all improvements made upon said lands and premises by the lessee, for unpaid balances hereunder.

In case other ores or minerals are discovered or mined on said lands by the lessee, it being hereby expressly granted the right to mine and remove the same, the royalty thereon shall be thirty-three per centum of the market value or selling price of all such ores or minerals at the market or markets therefor, less all transportation charges, which shall first be deducted from such market value or selling price and retained by the lessee, such royalty to be due and payable at the same times and in the same manner that the royalty on the iron ore shall be due and payable, and quarterly reports of the quality, grade and quantity of such ores and minerals shall be made at the same times and in the same manner that the iron ore reports are required to be made hereunder.

The covenants, terms and conditions of this lease shall run with the land and be in all respects binding and operative upon the heirs, legal representatives, successors and assigns of both parties hereto.

In testimony whereof, the parties of the first have hereunto
190 set their hands and seals, and the party of the second part has caused its corporate name and seal to be hereto affixed and these presents to be attested by its president and secretary, all the day and year first above written.

HENRY STEPHENS. [SEAL.]
SARAH M. STEPHENS. [SEAL.]
By ALBERT L. STEPHENS,
Her attorney in fact.
ALBERT L. STEPHENS [SEAL.]
FRANCES H. STEPHENS [SEAL.]
THE ALWORTH-STEPHENS COMPANY.
By M. H. ALWORTH, *President.*
L. I. FEETHAM, *Secretary.*

[CORPORATE SEAL.]

Signed, sealed and delivered in presence of—
ELVERTON F. JENKS,
JENNIE M. CAMPBELL,
As to the Parties of the First Part.
J. M. CRAVER.
CHESTER WRIGHT.

STATE OF MICHIGAN,
County of Wayne, ss:

On this seventh day of April 1909, before me a notary public within and for said county personally appeared Albert L. Stephens and Frances H. Stephens, his wife, to me well known to be the same

persons described in and who executed the foregoing instrument and they acknowledged that they executed the same as their free act and deed.

[NOTARY SEAL.] ELVERTON F. JENKS,
Notary Public, Wayne Co., Mich.

My commission expires Oct. 23", 1910.

STATE OF MICHIGAN,
County of Wayne, ss:

On this seventh day of April 1909, before me a notary public within and for said county personally appeared Henry Stephens, to me well known to be the same person described in and who
191 executed the foregoing instrument and he acknowledged that he executed the same as his free act and deed.

[NOTARY SEAL.] ELVERTON F. JENKS,
Notary Public, Wayne Co., Mich.

My commission expires Oct. 23", 1910.

STATE OF MICHIGAN,
County of Wayne, ss:

On this seventh day of April, 1909, before me a notary public within and for said county, personally appeared Albert L. Stephens to me known to be the person who executed the foregoing instrument in behalf of Sarah M. Stephens, and acknowledged that he executed the same as the free act and deed of said Sarah M. Stephens.

[NOTARY SEAL.] ELVERTON F. JENKS,
Notary Public, Wayne Co., Mich.

My commission expires Oct. 23", 1910.

STATE OF FLORIDA,
County of Hillsborough, ss:

On this 13" day of April, 1909, before me a notary public within and for said county, personally appeared M. H. Alworth, to me well known, who being by me first duly sworn did say that he is the president of the Alworth-Stephens Company, the corporation described in and which executed the foregoing instrument; that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and the said M. H. Alworth acknowledged the said instrument to be the free act and deed of said corporation.

[NOTARY SEAL.] J. M. CRAMER,
Notary Public, Hillsborough County, Florida at Large.

My commission expires Dec. 30, 1912.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 19" day of April, 1909, before me a notary public, within and for said county, personally appeared L. I. Feetham, to me
192 well known, who being by me first duly sworn did say that

she is the secretary of the Alworth-Stephens Company, the corporation described in and who executed the foregoing instrument; that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and the said L. I. Feetham acknowledged the said instrument to be the free act and deed of said corporation.

[NOTARY SEAL.] F. M. EMANUELSON,
Notary Public, St. Louis Co., Minn.

My commission expires Mar. 11, 1912.

(Endorsed:)
Mining lease. Henry Stephens et al. to the Alworth-Stephens Company.
134146. Office of register of deeds, State of Minnesota, county of St. Louis, ss: I hereby certify that the within instrument was filed in this office for record Apr. 19, 1909, at 9.30 a. m. and was duly recorded in Book 6 of Agrmts., page 402. M. C. Palmer, register of deeds; by Thos. Clark, deputy.
Compared, H. Reading, R.
W. B. & M.

EXHIBIT J

Lease

This indenture, made this twelfth day of March, A. D. 1909, by and between the Alworth-Stephens Company, a corporation organized and existing under the laws of the State of Minnesota, as party of the first part, hereinafter called the lessor, and Syracuse Mining Company, a corporation created and existing under the laws of the State of Minnesota, as party of the second part, hereinafter called the lessee,

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Witnesseth: That the said lessor, for and in consideration of the sum of one dollar, and other valuable considerations to it in hand paid by the lessee the receipt whereof is hereby acknowledged, and in further consideration of the covenants, promises, and conditions hereinafter contained, to be kept and performed by the lessee, does hereby let, lease, and demise unto the lessee, its successors and assigns for a term of forty-nine (49) years from and after the date of this instrument, the following described lands situated in the county of St. Louis and State of Minnesota, to wit:

The northwest quarter of the northwest quarter of section four (4), in township fifty-eight (58) north, of range fifteen (15) west of the fourth principal meridian;

Said lands are hereby leased by the lessor to the lessee for the purpose of exploring for, mining, taking out and removing therefrom the merchantable iron ore (as well as other minerals, as hereinafter provided) which is or which may hereafter be found on, in or under said lands, together with the right to construct all build-

ings and to make all excavations, openings, ditches, draines, railroads, wagon roads, and all other improvements upon said lands and premises, which are or which may become necessary or suitable for the mining or removing of the iron ore therefrom, and the carrying on of mining operations thereon, and together with the right, during the continuance of this lease, to cut and use all of the timber, other than pine timber, which may be found upon said lands, free and without charge, so far as may be necessary for fuel and in the construction of buildings required in the operation of any mine or mines upon said lands, and for drains, tram-ways, supports or shafts of or within any such mine or mines, or in connecting the same with any line or lines of railroad over or upon which the said ore may be transported.

Provided, however, that the lessee, its successors and assigns, shall have the right at any time upon thirty days notice to terminate this agreement and lease, in so far as it requires the lessee to mine ore on said lands, or to pay royalty therefor, or to pay taxes thereon, by giving written notice in manner as hereinafter provided to the lessor, or its legal representatives or assigns, who shall, in such case, acknowledge in writing the receipt of such notice, and this
194 lease shall terminate thirty days after the giving of such notice, whether so acknowledged or otherwise. All arrearages and sums, including taxes, which may be due and payable under this lease up to the time of its termination as set forth in such notice, shall be paid within thirty days after such termination and the lessee, its successors or assigns, upon such termination shall immediately execute and record formal relinquishment of such lease in the office of the register of deeds of St. Louis County, Minnesota. Such notice of termination may be delivered personally to the lessor, its legal representatives or assigns, or it may be given by registered letters mailed from any post office in the United States, postage prepaid, and addressed to the lessor, or its legal representatives or assigns, at their last known place of residence.

The lessor hereby further agrees that the lessee, its successors and assigns, shall have the right to assign this lease, or contract with others to work any mine or mines which are now or may hereafter be discovered upon said lands, or subcontract or sublet the same, at its option, with the same rights and privileges as are hereby granted to the lessee, it being expressly understood, however, that any such assignment shall not operate as a release or discharge of the lessee from the performance of the conditions of this lease, until and unless the lessor shall specifically consent to said assignment in writing.

The lessee, for itself, its successors and assigns, hereby covenants and agrees to and with the lessor that the lessee will from and after the date hereof and on or before the tenth days of January, April, July, and October in each calendar year covered by the term of this lease, or for the period of time for which this contract and lease continues in force, pay to the lessor for all iron ore which shall be mined and removed from said lands during the three calendar

months next preceding the first day of the month in which payment is to be made as aforesaid, a royalty of sixty (60) cents per ton for all iron ore so taken out, mined and carried away from said lands and premises, each ton in all cases to be reckoned at 2,240 pounds.

The lessee, for itself, its successors and assigns, hereby covenants and agrees to and with the lessor that from and after the date of this lease, during each and every calendar year for the period of the term of this lease, or until the surrender or assignment of the same, in the manner herein provided, the lessee will mine and remove from the said lands, which for all and singular the purposes of this lease shall be considered as one tract of parcel, at least
195 fifty thousand (50,000) tons annually of iron ore, or that he will pay to the lessor an advance royalty which shall be treated and considered as ground rent, of sixty cents per gross ton on such minimum quantity each year, the same as if actually mined and removed.

It being the intention hereof that it shall be optional with the lessee, either to mine, remove or take away iron ore from said premises during each calendar year while this lease continues in force, or in lieu thereof to pay the lessor an advance royalty of sixty cents per ton on said annual minimum quantity above described, the same as if actually mined and removed. The said obligation of the said lessee to pay said advance royalty of sixty cents per gross ton upon fifty thousand (50,000) tons annually, or such ground rent equivalent to sixty cents per ton upon said minimum annual quantity, shall continue in force without regard to the quantity or quality of ore existing in said premises, during the full term of this lease, or until the same is terminated or surrendered or assigned in the manner herein provided; and in case of the assignment of this lease in the manner herein provided, the obligation to mine and pay for such annual minimum quantity of ore, as well as all other provisions of this lease, shall rest upon and bind such assignee as fully as the lessee is hereby bound.

The said ground rent or advance royalty herein agreed to be paid, shall become due and be paid quarterly, at the time and in the manner as hereinbefore provided for the payment for ore actually mined and shipped away; provided, however, that if in any one or more years, or in any quarter or quarters of any year or years, more ore is thus paid for than is actually mined and removed in such year or years, or in any quarter or quarters of any such year or years, then and in such case the iron ore so paid for and not removed may be removed in any subsequent year or years, or in any subsequent quarter or quarters of such year or years, during the continuance of this lease, without other payment therefor, but such ore so permitted to be removed in any subsequent quarter or quarters of such year, must be in excess of the aggregate minimum amount agreed herein to be mined and removed, or paid for, during all of the quarters of such year, which shall have, at the time of such payment, expired and ore so permitted to be removed in any subsequent year, in consideration

of such prepayment, must be in excess of the stipulated amount agreed to be mined, removed and paid for, whether mined or not during such year it being the intention hereof that the lessee
196 shall not be required to make prepayment as advance royalty or ground rent, for any greater quantity of iron ore during any year of this lease, than fifty thousand (50,000) tons annually, unless a greater quantity than said amount is actually mined and removed from said premises.

The lessess, its successors and assigns, at the time of making each of said payments, shall transmit to the lessor, its legal representative or assigns, an exact truthful statement of the amount of iron ore removed from said lands for the three calendar months for which such payment is to be made. The iron ore so taken out by the lessee, its successors or assigns, from said lands, shall be weighed by the railroad company transporting the same therefrom, which weights shall determine the quantity as between the parties hereto, prima facie.

The lessee, its successors and assigns, shall furnish the lessor monthly statements showing the aforesaid weights. The right, however, is hereby conceded to and reserved by the said lessor, by its duly authorized agents, to inspect, view, and test the correctness of the railroad company's weights at any time, and in such manner as may seem proper to adopt; it being understood that any errors in these respects, when ascertained, are to be cognizable and corrected and any such differences shall be settled and paid for at the next regular quarterly payment.

The lessee hereby covenants and agrees to conduct all its mining operations on said lands in a good workmanlike manner, and in accordance with the requirements of good engineering and so as not to be or cause or permit any unnecessary or unusual permanent injury to the same or inconvenience or hindrance in the subsequent operation of the mine or mines thereon.

The lessee shall pay all taxes and assessments, ordinary and extraordinary general and specific, which may be levied or assessed upon the lands demised hereby and on the iron ore mined thereon, and on all improvements and personal property thereon, while this lease is in force, and shall furnish the lessor with duplicate tax receipts showing the payment of any such assessments or taxes; provided, however, that the lessee, shall have the right to contest in the courts or otherwise, the validity of any such taxes or assessments, in case it shall deem the same unjust, unequal, or excessive, or to take such other steps or proceedings as it deems necessary to compel and secure a reduction, readjustment of equalization thereof, be-
197 fore it shall be required hereunder to pay or discharge the same, or any part thereof, and at the termination of this lease, or in case the same is surrendered in manner as hereinbefore provided ,the lessee further hereby agrees peacefully to surrender the possession of the said lands to the lessor.

The lessee hereby further covenants and agrees that, while this lease is in force and until it is surrendered or assigned in manner as herein provided, it will protect the said lands and premises from all mechanics' liens or labor liens and keep the title to the same free from all clouds or encumbrances arising therefrom in any way on account of its mining operations thereon or the use and occupation thereof by it, its agents, servants or employees or its contractors.

The lessor hereby expressly covenants and represents that the said leased lands are now owned in fee by Henry Stephens an undivided seven-ninths thereof, and Albert L. Stephens an undivided two-ninths thereof, and that the lessor has good right and lawful authority to make this lease.

The payments required to be made hereunder shall be made at the Northern National Bank of Duluth, Minnesota, or at any other bank or place that the lessor, its legal representatives or assigns may from time to time in writing designate, and the bank so designated shall be considered and treated as the agent of the lessor, for the purpose of receiving, collecting and receipting for such payments. The payments provided in this lease to be made by the lessee shall be made in gold coin of the United States of the present standard, or its equivalent.

It is mutually understood and agreed that upon the termination of this lease, whether by the acts of the parties or either of them, or by expiration of the term, the lessee, its successors and assigns, shall have sixty (60) days in which to remove all engines, tools, machinery, railroad tracks or structures erected or placed by it upon said premises, provided that all taxes, royalties or other dues have been paid and other conditions performed by it, but they shall not remove or impair any supports placed in the mine or mines, or any timber or framework necessary to the use or maintenance of the shafts or approaches to the mine or mines or the tramways within the same, and on failure within the time above specified to so remove such property, all the same shall belong to and become the property of the lessor or its successors in interest.

198 The lessor expressly reserves to itself, and the lessee hereby assents thereto, the right, by its duly authorized agents, to enter into or upon said leased lands, mines and premises, at any time or times, to inspect or survey the same and to measure the quantity of ore that shall have been mined or removed therefrom, not unnecessarily or unreasonably hindering or interrupting the operations of the lessee.

This lease is upon the express condition that if such royalty, or any part thereof, be and remain unpaid after the days and times above specified, and if the same remain in default for a period of sixty days, or in the case the lessee fails to keep any of the covenants or conditions herein expressed to be kept and performed by it, and such failure shall continue for sixty days after receiving written notice from the lessor specifying the default, neglect or failure

complained of, then and from thenceforth, and in either of these events, but not otherwise, it shall be lawful for the lessor, at its option to take possession of the said leased lands, with or without any previous process whatsoever, and to re-enter and have and possess the same again as fully as if no lease had been given to the lessee, and it and all parties claiming under it shall be wholly excluded therefrom, and the lessor hereby reserves and shall at all times possess and hold a lien upon all iron ore mined and upon all improvements made upon said lands and premises by the lessee, for unpaid balances hereunder.

In case other ores or minerals are discovered or mined on said lands by the said lessee, it being hereby expressly granted the right to mine and remove the *the* same, the royalty thereon shall be thirty-three per centum of the market value or selling price of all such ores or minerals at the market or markets therefor, less all transportation charges which shall first be deducted from such market value or selling price and retained by the lessee, such royalty to be due and payable at the same time and in the same manner that the royalty on iron ore shall be due and payable, and quarterly reports of the quality, grade and quantity of such ores and minerals shall be made at the same times and in the same manner that the iron ore reports are required to be made hereunder.

The covenants, terms and conditions of this lease shall run with the land and be in all respects binding and operative upon the heirs, legal representatives, successors and assigns of both parties hereto.

In testimony whereof, the parties hereto have caused
199 their corporate names and seals to be hereto affixed and this instrument to be executed by their respective executive officers, all the day and year first above written.

THE ALWORTH-STEPHENS COMPANY,
By M. H. ALWORTH, *President*,
And L. I. FEETHAM, *Secretary*.
SYRACUSE MINING COMPANY,
By H. G. DALTON, *President*,
[CORPORATE SEAL.] And H. S. HASELTON, *Secretary*.

In presence of—
F. M. EMANUELSON.
J. M. CRAVER.
C. L. CUTTER.
H. B. DRAKE.

STATE OF FLORIDA,
County of Hillsborough, ss:

On this 9th day of April, 1909, before me a notary public within and for said county, personally appeared M. H. Alworth, to me well known, who being by me first duly sworn did say that he is the president of the Alworth-Stephens Company, the corporation described

in and which executed the foregoing instrument; that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and the said M. H. Alworth acknowledged the said instrument to be the free act and deed of said corporation.

[NOTARY SEAL.] J. M. CRAVER, *Notary Public,*
State of Florida at Large County, Florida.

My commission expires Dec. 30, 1912.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 5 day of April, 1909, before me a notary public within and for said county, personally appeared L. I. Feetham, to me well
200 known, who being by me first duly sworn did say that she is the secretary of the Alworth-Stephens Company, the corporation described in and who executed the foregoing instrument; that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and the said L. I. Feetham acknowledged the said instrument to be the free act and deed of said corporation.

[NOTARY SEAL.] F. M. EMANUELSON,
Notary Public, St. Louis Co., Minn.

My commission expires Mar. 11, 1912.

STATE OF OHIO,
County of Cuyahoga, ss:

On this second day of April, 1909, before me a notary public within and for said county, personally appeared H. G. Dalton and H. S. Haselton to me personally known, who being by me first duly sworn did say that they are respectively the president and secretary of the Syracuse Mining Company, the croproation described in and who executed the foregoing instrument; that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and the said H. G. Dalton and H. S. Haselton acknowledged the said instrument to be the free act and deed of said corporation.

[NOTARY SEAL.] GUSTAV VON DER STEINER,
Notary Public, Cuyahoga County, Ohio.

My commission expires July 16, 1909.

(Endorsed:) Mining lease. The Alworth-Stephens Co to Syracuse Mining Co. Recorded Apr. 19/09. Book 6, Agreements 408.
201 [Exhibit K, blue print showing explorations on section 26, township 59, range 15, omitted in printing.]

202

EXHIBIT L

Alworth-Stephens Company—Table showing royalties received and disbursement to fee owners and stockholders

Date received	Royalty	Fee owners	Stockholders
1909			
Jan. 13	$9,375.00	$3,750.00	$5,000.00
Apr. 13	9,375.00	3,750.00	5,000.00
May 4	1,583.33	791.67	
June 4			5,000.00
July 14	16,875.00	7,500.00	9,500.00
Oct. 11	16,875.00	7,500.00	9,500.00
1910			
Jan. 12	16,785.00	7,500.00	9,250.00
Apr. 11	16,875.00	7,500.00	9,000.00
July 12	16,875.00	7,500.00	9,500.00
Oct. 13	23,050.48	9,970.19	13,000.00
1911			
Jan. 11	88,416.72	40,821.51	47,750.00
Apr. 10	16,875.00	7,500.00	9,000.00
July 11	16,875.00	7,500.00	9,250.00
Oct. 13	16,966.88	7,545.94	9,500.00
1912			
Jan. 13	27,149.87	12,637.43	14,500.00
Apr. 10	16,875.00	7,500.00	9,250.00
July 11	26,685.51	12,405.25	13,250.00
Oct. 14	89,396.98	42,424.06	47,000.00
1913			
Jan. 10	43,363.85	21,671.13	21,500.00
Apr. 14	16,875.00	7,500.00	9,500.00
July 14	26,956.42	12,204.07	14,500.00
Oct. 11	164,269.90	76,114.32	87,500.00
1914			
Jan. 12	26,215.67	12,339.21	13,750.00
Apr. 11	16,875.00	7,500.00	9,500.00
July 10	16,875.00	7,500.00	8,500.00
Oct. 10	21,932.63	10,966.31	11,250.00
1915			
Jan. 9	39,583.10	19,791.52	19,750.00
Apr. 10	16,875.00	7,500.00	9,000.00
July 12	22,750.15	10,437.27	12,250.00
Aug. 26	2,500.00	(For release of SE. ¼–SE. ¼, 26–59–15)	2,500.00
Oct. 11	87,798.29	43,899.14	42,750.00
203 1916			
Jan. 10	9,497.81	4,748.91	4,750.00
Apr. 11	16,875.00	7,500.00	8,500.00
July 10	18,013.98	8,069.49	10,500.00
Oct. 10	33,678.48	15,901.74	17,750.00
1917			
Jan. 10	35,238.59	16,681.79	18,500.00
Apr. 10	16,875.00	7,500.00	8,000.00
July 12	22,086.79	9,877.89	12,250.00
Oct. 10	67,221.52	29,833.11	37,500.00

Alworth-Stephens Company—Table showing royalties received, etc.—Continued

Date received	Royalty	For owners	Stockholders
1918			
Apr. 11	$9,375.00	$3,750.00	
July 10	30,223.37	14,174.26	$11,250.00
Oct. 10	35,317.14	15,722.70	
Dec. 30	6,562.90		
1919			
Jan. 10		3,281.45	
Apr. 11	4,687.50	1,875.00	
June 12			7,000.00
July 10	4,687.50	1,875.00	2,750.00
Oct. 12	4,687.50	1,875.00	
	$1,244,897.86	$574,186.36	$635,250.00

EXHIBIT M

Alworth-Stephens Company—Table showing Federal taxes paid

Date	Year's tax	Amount
June 27, 1910	1909	$257.05
June 27, 1911	1910	359.16
June 26, 1912	1911	192.99
June 18, 1913	1912	220.07
June 22, 1914	1913	1,337.25
June 22, 1915	1914	422.53
June 7, 1916	1915	874.53
June 27, 1916	1912 ad.	568.67
Feb. 17, 1917	1911 ad.	511.08
May 11, 1917	1916	808.00
June 10, 1918	1917	10,253.21
Feb. 21, 1919	1917 ad.	17,128.44
June 12, 1919	1918	913.73
		$33,846.76

204 EXHIBIT N

Release

Whereas, by an indenture dated March 12, 1909, the Alworth-Stephens Company, a corporation organized and existing under the laws of the State of Minnesota, did let, lease and demise to Syracuse Mining Company, a corporation also organized and existing under the laws of said State of Minnesota, for the term of forty-nine years from and after said date, those certain premises hereinafter described, for the purpose of exploring for, mining, taking out and removing therefrom the merchantable iron ore and other minerals upon certain terms and conditions in said indenture provided, which said indenture was thereafter duly filed for record in the office of the register of deeds of St. Louis County, Minnesota, and is of record in said office in Book 6 of Agreements at page 408; and

Whereas, it was in said indenture, among other things, provided *that* said Syracuse Mining Company should have the right to surrender and terminate said lease by giving to said The Alworth-Stephens Company thirty days' written notice of its intention so to do, and that in such event said Syracuse Mining Company should immediately execute and record a formal relinquishment of such lease in the office of the register of deeds of said St. Louis County, Minnesota; and

Whereas, said Syracuse Mining Company has heretofore elected to terminate and surrender said lease on December 31, 1918, and has duly given and served thirty days' written notice of its intention so to do in all respects as provided in said indenture of lease, and has in all respects duly conformed to and performed all of the terms and conditions under said indenture;

Now, therefore, said Syracuse Mining Company, the grantor, in consideration of the premises, and the sum of one dollar ($1.00) to it in hand paid by said The Alworth-Stephens Company, the grantee, doth hereby give, grant, remise, release and forever quit-claim to the said grantee, its successors and assigns, all such right, title, interest and estate as the grantor may have in and to the following described premises, to-wit:

Situated in the county of St. Louis and State of Minnesota, and known as the northwest quarter (NW. ¼) of the northwest quarter (NW. ¼) of section four (4) in township fifty-eight (58),
305 north of range fifteen (15) west of the fourth principal meridian, and being all and singular the premises described in and covered by the said indenture of lease dated March 12, 1909, hereinbefore described, which said indenture of lease is hereby terminated and surrendered.

The grantor expressly reserves to itself, however, the right as provided in said indenture of lease, to have sixty (60) days from December 31, 1918, in which to remove all engines, tools, machinery, railroad tracks or structures erected or placed by the grantor upon said premises as in said indenture provided.

To have and to hold the said premises hereinbefore described, and all the right, title and interest of the grantor, therein, (except only said engines, tools, machinery, railroad tracks and structures, and the right to remove the same within said period of sixty days), to the said grantee, its successors and assigns forever.

In testimony whereof, said Syracuse Mining Company has caused its corporate name to be signed and its corporate seal to be affixed hereto by its president and secretary this thirty-first day of December, A. D. one thousand nine hundred and eighteen.

[CORPORATE SEAL.]

SYRACUSE MINING COMPANY,
By H. G. DALTON, *President.*
Attest: S. E. BOOL, *Secretary.*

Signed, sealed and delivered in the presence of—
HERBERT C. JACKSON,
MABEL G. WILLIAMS.

STATE OF OHIO,
County of Cuyahoga, ss:

On this 20th day of December, 1918, before me, a notary public within and for said county and State, personally appeared H. G. Dalton and C. E. Bool both to me well known, who being by me first duly sworn, did severally depose and say that he, the said H. G. Dalton is president of Syracuse Mining Company, the corporation described in and which executed the foregoing instrument, and that he S. E. Bool is the secretary of said corporation, and that the
206 seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and the said H. G. Dalton and S. E. Bool duly acknowledged the said instrument to be the free act and deed of said Syracuse Mining Company.

Witness my hand and official seal the day and year above written.

[NOTARY SEAL.] E. E. STEVENS, *Notary Public.*

My commission expires: April 20, 1920.

(Endorsed:) Deed of release from Syracuse Mining Company to the Alworth-Stephens Company. Dated Dec. 31st, 1918. 292519. Office of register of deeds, State of Minnesota, county of St. Louis, ss: I hereby certify that the within instrument was filed in this office for record Dec. 30, 1918, at 8.30 a. m. and was duly recorded in Book 32 of Agts. at page 135. Chas. Calligan, register of deeds; by S. L. Pierce, deputy.

Compared, K. Reading T.

EXHIBIT O.

Release

Know all men by these presents, that the Alworth-Stephens Company, a corporation organized under the laws of the State of Minnesota, hereinafter called the lessee, in consideration of the sum of one dollar ($1.00) the receipt of which is hereby acknowledged, does hereby release and relinquish unto Henry Stephens and Sarah M. Stephens, his wife, and Albert L. Stephens and Frances H. Stephens his wife, and unto their heirs and successors in interest, hereinafter called the lessors, all further rights under that certain mining lease executed by the lessors to the lessee, dated March 12, 1909, and recorded on the 19th day of April, 1909, in the office of the register of deeds of St. Louis County, Minnesota, in Book 6 of Agreements, page 402, the same covering the

Northwest quarter of the northwest quarter (NW. ¼ of NW. ¼) of section four (4), township fifty-eight (58) north of range fifteen (15) west of the fourth principal meridian in said county of St. Louis and State of Minnesota.

207 The deposit of iron ore in said land having been mined out and exhausted under the authority of said lease, the intention of this instrument is to terminate said lease and to surrender to the owners of the fee title all rights thereunder.

In testimony whereof, the said Alworth-Stephens Company has caused its corporate name and seal to be hereunto affixed by its president and secretary this 31st day of January, A. D. 1919.

ALWORTH-STEPHENS COMPANY,
By J. L. W., *President*,
And H. C. S., *Secretary*.

In presence of—
P. L. R.
H. G. McK.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 31st day of January, 1919, before me, a notary public within and for said county, personally appeared J. L. Washburn and H. C. Strong, to me personally known, who, being each by me duly sworn did say they are respectively the president and the secretary of Alworth-Stephens, the corporation named in the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said J. L. Washburn and H. C. Strong acknowledged said instrument to be the free act and deed of said corporation.

P. L. R.

(Endorsed:) Copy. Surrender of mining lease. 293765. Office of register of deeds, State of Minnesota, county of St. Louis, ss: I hereby certify that the within instrument was filed in this office for record January 31, 1919, at 2 p. m., and was duly recorded in Book 23 of Agreements, page 51. Charles Calligan, register of deeds; by C. L. Lofgren, deputy.

Compared, K. Reading, F.

208 EXHIBIT P

General offices, Duluth, Minnesota.
R. M. Sellwood, manager.
Mine office, Aurora, Minnesota.

PERKINS MINING COMPANY,
Duluth, Minn., Oct. 1st, 1919.

THE ALWORTH-STEPHENS COMPANY,
Alworth Building, Duluth, Minnesota.

GENTLEMEN: Enclosed herewith please find release of mining lease from the Perkins Mining Company to Alworth-Stephens Company of the SW. of NW. and the NE. of SW., section 26–59–15, and

the N.½ of NE., section 11–59–14; which release has been recorded in the office of the register of deeds of St. Louis County.

Yours very truly,

PERKINS MINING COMPANY,
By JOHN MONAGHAN.

Release

This indenture made this 20th day of September, 1919, between Perkins Mining Company, a corporation, party of the first part, *the* The Alworth-Stephens Company, a corporation, party of the second part, witnesseth:

Whereas the Alworth-Stephens Company as lessor by an agreement and lease in writing bearing date the first day of September, 1908, and recorded on page 235 of Book 10 of Agreements in the office of the register of deeds of St. Louis County, Minnesota, on the 31st day of December, 1909, leased and let to John S. Lutes as lessee the southwest quarter of the northwest quarter and the northeast quarter of the southwest quarter of section twenty-six (26) in township fifty-nine (59) north, of range fifteen (15) west and the north half of the northeast quarter of section eleven (11) in township fifty-nine (59) north, of range fourteen (14) west in St. Louis
209 County, Minnesota, for the purpose of mining and removing iron ore therefrom, which lease was by an instrument in writing bearing date the first day of February, 1909, and recorded on page 241 of Book 10 of Agreements in the office of said register of deeds on the 31st day of December, 1909, assigned by said John S. Lutes and his wife to Perkins Mining Company, a corporation, which is now the owner and holder of said lease.

Whereas said Perkins Mining Company, more than thirty (30) days prior to the date hereof, gave written notice to the Alworth-Stephens Company that said lease would terminate at the expiration of thirty (30) days from the date of said notice in so far as said lease required the lessee, or said Perkins Mining Company to mine ore on said lands or to pay royalties therefor, or to pay taxes on said lands.

Now therefore, pursuant to the terms of said lease in such case provided, said Perkins Mining Company does hereby relinquish and surrender to the Alworth-Stephens Company and its successors and assigns, said lease and all the right of said Perkins Mining Company thereunder, and said lease is fully canceled and terminated.

In witness whereof, said Perkins Mining Company has caused these presents to be executed by its president and its secretary, and its corporate seal to be hereto attached the day and year first above written.

PERKINS MINING COMPANY,
[CORPORATE SEAL] By R. M. SELLWOOD, *Its President*,
JOHN MONAGHAN, *Its Secretary*.

In presence of—
C. O. BALDWIN.
C. H. MUNGER.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 22nd day of September, 1919, before me, a notary public within and for said county, personally appeared R. M. Sellwood and John Monaghan, to me personally known, who, being by me duly sworn, did say:

That they are the president and secretary, respectively of Perkins Mining Company, the corporation named in the foregoing instrument; that the seal affixed to said instrument is the corporate
210 seal of said corporation; that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and said R. M. Sellwood and John Monaghan acknowledged said instrument to be the free act and deed of said corporation.

C. O. BALDWIN,
[NOTARY SEAL.] *Notary Public, St. Louis County, Minnesota.*

My commission expires August 9, 1926.

(Endorsed:) 305425. Release of mining lease. Perkins Mining Company to the Alworth-Stephens Company. Office of register of deeds, State of Minnesota, county of St. Louis, ss: I hereby certify that the within instrument was filed in this office for record Sept. 24, 1919, at 4.30 p. m. and was duly recorded in Book 20 of Agrmts., page 447. Chas. Calligan, register of deeds; by C. L. Lofgren, deputy. Compared, K. Reading, F.

EXHIBIT Q

Release

Know all men by these presents, that the Alworth-Stephens Company, a corporation organized under the laws of the State of Minnesota, hereinafter called the lessee, in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, does hereby release, relinquish and surrender unto Henry Stephens and Sarah M. Stephens, his wife, Albert L. Stephens and Frances H. Stephens, his wife, and unto their heirs and successors in interest, hereinafter called the lessors, all further rights and interests under that certain mining lease executed by the lessors to the lessee, dated August 25, 1908, and recorded on the 28th day of December, 1908, in Book 6 of Agreements on page 297, in the office of the register of deeds of St. Louis County, Minnesota, the same covering

The southwest quarter of the northwest quarter (SW. ¼ of NW. ¼), the northeast quarter of the southwest quarter (NE. ¼ of SW. ¼) of section twenty-six (26) in township fifty-nine (59) north of range fifteen (15) west, and the north half of the northeast quarter (N ½ of NE. ¼) of section eleven (11) in township fifty-nine (59) north of range fourteen (14) west of the fourth principal meridian in said county of St. Louis.

The intention of this instrument is to terminate said lease and to surrender to the present owners of the fee title all rights thereunder.

211 In testimony whereof the said Alworth-Stephens Company has caused its corporate name and seal to be hereunto affixed by its president and secretary this 26th day of December, A. D. 1919.

[CORPORATE SEAL.] ALWORTH-STEPHENS COMPANY,
By J. L. WASHBURN, *President*,
And PHILIP L. RAY, *Secretary*.

In presence of—
GEORGE W. HART.
FRANK J. O'DONNELL.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 26th day of December, A. D. 1919, before me, a notary public within and for said county, personally appeared J. L. Washburn and Philip L. Ray, to me personally known, who being each by me duly sworn did say that they are respectively the president and secretary of Alworth-Stephens Company, the corporation named in the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by the authority of its stockholders and also of its board of directors, and said J. L. Washburn and Philip L. Ray acknowledged the said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] GEORGE W. HART,
Notary Public, St. Louis County, Minn.

My commission expires Sept. 20, 1923.

(Endorsed:) Copy. 311068. Office of register of deeds, State of Minnesota, county of St. Louis, ss: I hereby certify that the
212 within instrument was filed in this office for record December 27, 1919, at 11 a. m. and was duly recorded in Book 20 of Agts., page 503. Charles Calligan, register of deeds; by S. L. Pierce, deputy.

EXHIBIT R

Release

Know all men by these presents, that the Alworth-Stephens Company, a corporation organized under the laws of Minnesota, at the request of the owners of the lands hereinafter referred to and in consideration of one dollar ($1.00), the receipt of which is hereby acknowledged, does hereby release and relinquish unto Henry Stephens, Sarah M. Stephens, Albert L. Stephens and Frances H. Stephens, their heirs and assigns and successors in ownership, all rights under that certain exploratory agreement running to

Marshall H. Alworth, dated September 4th, 1907, and recorded on Sept. 19th, 1907, in the office of the register of deeds of St. Louis County, Minnesota, in Book 4 of Agreements on page 464 et seq., as to all the lands in said agreement described except the following tracts all in said St. Louis County, to-wit:

The northwest quarter of the northwest quarter (NW. ¼ of NW. ¼) of section four (4), in township fifty-eight (58) north, of range fifteen (15) west of the fourth principal meridian;

The southwest quarter of the northwest quarter SW. ¼ of NW. ¼), and the northeast quarter of the southwest quarter (NE. ¼ of SW. ¼), and the southeast quarter of the southeast quarter (SE. ¼ of SE. ¼) of section twenty-six (26) in township fifty-nine (59) north, of range fifteen (15) west of the fourth principal meridian;

The north half of the northeast quarter (N. ½ of NE. ¼) of section eleven (11) in township fifty-nine (59) north, of range fourteen (14) west of the fourth principal meridian,

and except as to the foregoing described lands, the lands covered by said agreement shall hereafter stand freed therefrom and
213 from any claims of said Alworth-Stephens Company as fully as though the said agreement had never been made, said agreement having been duly assigned to said company by Marshall H. Alworth and wife Oct. 5th, 1907, the instrument of assignment having been recorded in said register of deeds office on Oct. 5th, 1907, in Book 5 of Agreements on page 180.

In witness whereof, said Alworth-Stephens Company has caused its corporate name and seal to be hereunto affixed and this instrument to be executed in its name and behalf by its president and secretary this 28th day of July 1915.

THE ALWORTH-STEPHENS COMPANY,
By ----------*President*,
And ----------*Secretary*.

In the presence of—

----------,
----------,
Witnesses.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 28th day of July A. D., 1915, before me, a notary public, within and for said county, personally appeared J. L. Washburn and Philip L. Ray, to me personally known, who being each by me duly sworn did say that they are respectively the president and the secretary of the Alworth-Stephens Company, the corporation named in the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its stockholders and its board of directors, and said J. L.

Washburn and Philip L. Ray acknowledged said instrument to be the free act and deed of said corporation.

----------,
Notary Public, St. Louis County, Minnesota.

My commission expires----------

214 EXHIBIT 8

Release, Alworth-Stephens Company to Henry Stephens et al., Aug. 26, 1915

Known all men by these presents, that the Alworth-Stephens Company, a corporation organized under the laws of Minnesota, in consideration of the sum of one dollar ($1.00) and other valuable considerations, the receipt of which is hereby acknowledged, does hereby release and relinquish unto Henry Stephens, Sarah M. Stephens, Albert L. Stephens, and Frances H. Stephens, their heirs and assigns and successors in ownership, all rights under that certain exploratory agreement running to Marshall H. Alworth, dated September 4th, 1907, and recorded on Sept. 19th, 1907, in the office of the register of deeds of St. Louis County, Minnesota, in Book 4 of Agreements on page 464 et seq., as to that certain tract of land in said St. Louis County described as follows:

The southeast quarter of the southeast quarter (SE. ¼ of SE. ¼), section twenty-six (26), township fifty-nine (59) north, of range fifteen (15) west of the fourth principal meridian,

and the foregoing described land covered by said agreement shall hereafter stand freed therefrom and from any claims of said Alworth-Stephens Company as fully as though the said agreement had never been made, said agreement having been duly assigned to said company by Marshall H. Alworth and wife Oct. 5th, 1907, the instrument of assignment having been recorded in said register of deeds office on Oct. 5th, 1907, in Book 5 of Agreements on page 180.

In witness whereof, said Alworth-Stephens Company has caused its corporate name and seal to be hereunto affixed and this instrument to be executed in its name and behalf by its president and secretary this 26th day of August 1915.

THE ALWORTH-STEPHENS COMPANY,
By ----------*President,*
And ----------*Secretary.*

In the presence of:

----------,
----------,
Witnesses.

215 STATE OF MINNESOTA,
County of St. Louis, ss:

On this 26th day of August A. D. 1915, before me, a notary public within and for said county, personally appeared J. L. Washburn and Philip L. Ray, to me personally known, who being each by me

duly sworn did say that they are respectively the president and the secretary of the Alworth-Stephens Company, the corporation named in the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its stockholders and its board of directors, and said J. L. Washburn and Philip L. Ray acknowledged said instrument to be the free act and deed of said corporation.

----------,
Notary Public, St. Louis County, Minnesota.

My commission expires----------

216–222 [Blue prints showing exploration on section 26, township 59, range 15; section 11, township 59, range 14; portion of section 33, township 59, range 15, omitted in printing.]

223 PLAINTIFF'S EXHIBIT 2

Certified copy of income tax return of Alworth-Stephens Company for the year 1917

United States of America

TREASURY DEPARTMENT, *April 26, 1920.*

Pursuant to section 882 of the Revised Statutes I hereby certify that the annexed are true copies of corporation income tax return for 1917, including "Supplementary sheet"; corporation excess profits tax return for 1917, filed by Alworth-Stephens Company, Duluth, Minnesota, including supplemental information of May 28, 1918, and letter of May 28, 1918, from Alworth-Stephens Company to the commissioner: claim for refund of $17,128.44, including (on face) three-page typewritten explanatory statement; copy of letter of February 21, 1919, from Alworth-Stephens Company to the collector of internal revenue for the district of Minnesota; cancelled check No. 739, for $10,253.21; memorandum of charge by the Northern National Bank, dated February 21, 1919, for $17,128.44; memorandum for taxpayer showing taxpayer's record of payment of $10,253.21; memorandum for taxpayer showing taxpayer's record of payment of $17,128.44; copy of letter of 4/8/20 to Alworth-Stephens Company from the commissioner, rejecting claim for refund, on file in this department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the secretary,

JOUETT SHOUSE,
Assistant Secretary of the Treasury.

(Thesaur Amer. Septent Sigil.)

Treasury Department, Chief Clerk and Superintendent.

Form 66.

224–225 [Copy of income tax returns, including "Supplementary sheet," etc., omitted in printing.]

226 (Endorsed:) Plaintiff's Exhibit 2, filed in U. S. District Court on June 6, 1921.

PLAINTIFF'S EXHIBIT 3

Alworth Stephens Co.—Statement of iron ore actually shipped from Perkin and Hudson mines from 1913 to 1919, inclusive

Date	Perkin	Hudson
1913	120, 012 tons	240, 513 tons
1914	18, 184 "	127, 526 "
1915		196, 952 "
1916	79, 281 "	110, 510 "
1917	80, 942 "	78, 962 "
1918	50, 811 "	84, 744 "
1919	18, 561 "	
Total	367, 791 tons	839, 207 tons

(Endorsed:) Plaintiff's Exhibit 3, filed in U. S. District Court on June 6, 1921.

PLAINTIFF'S EXHIBIT 4

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, APR. 8, 1920.

Address reply to Commissioner of Internal Revenue and refer to
IT: CL.
HWG–34752925.

ALWORTH-STEPHENS COMPANY,
1607 Alworth Building, Duluth, Minn.

SIRS: Your claim for the refunding of $17,128.44, additional corporation income and excess profits taxes for the year 1917, has been examined.

227 The basis of the claim is to the effect that your invested capital was improperly computed by this bureau, and further that you should be entitled to a deduction for depletion of ore deposits on leased property.

An examination of the papers in the case discloses that you submitted your original returns on which the computation of the excess profits tax was made at the 8% rate under the provisions of section 209 of the revenue act of 1917, which resulted in a total tax of $10,253.21, which was paid June 10, 1918.

After careful consideration your claim for assessment at the 8% rate was denied and you were advised to that effect under date of September 3, 1918. However, it was determined that some relief should be granted you from the excessive tax if computed under the

provisions of section 201 of the 1917 act and thereby a capital was constructed pursuant to section 210 and articles 18, 24 and 52 of regulations 41. This resulted in an additional assessment of $17,-128.44, which was paid under date of February 21, 1919.

You appealed from this assessment with the request that this bureau either compute your tax under the provisions of section 201 on the basis of allowing as invested capital the full value of your assets as of March 1, 1913, less depletion by subsequent mining operations or grant your original appeal under the provisions of section 209 of the act of 1917.

After careful reconsideration of the facts submitted, the previous action of the bureau denying your claim for assessments under the provisions of section 209 of the 1917 act is affirmed and the assessment under the provisions of section 210 of the same act, as stated in bureau letter of September 3, 1918, is fair and just. It might be appropriate to state at this point that the assessment made under section 210 was based on the constructive capital of $181,011.45, which capital is much higher than upon the basis as provided under section 201.

Relative to your claim for a deduction under gross income on account of depletion of leased ore deposits, you are advised that it is held that where a mine is leased the allowance for depletion under the revenue act of 1916 as amended by the Act of 1917, attaches only to the ownership of the ore in place and, therefore, the lessee is not entitled to a deduction for depletion.

228 Inasmuch as no further relief can be granted, your claim is hereby rejected.

Respectfully,

WM. M. WILLIAMS,
Commissioner.

(Endorsed:) Plaintiff's Exhibit 4, filed in U. S. District Court on June 6, 1921.

PLAINTIFF'S EXHIBIT 5

DEPARTMENT OF JUSTICE,
OFFICE OF SOLICITOR OF INTERNAL REVENUE,
Washington, D. C., October 30, 1919.

Mr. W. D. BAILEY,
Alworth Building, Duluth, Minnesota.

MY DEAR MR. BAILEY: I beg to acknowledge receipt of your letter of October 27, together with brief in behalf of Alworth-Stephens Company. After this application for refund has had careful consideration by this office, I will advise you as to our conclusion.

Yours very truly,

ROBERT N. MILLER, *Solicitor.*

RNM: W.

DECEMBER 1ST, 1919.

Hon. ROBERT N. MILLER,
Solicitor, Internal Revenue Dept.,
Washington, D. C.

Subject: Alworth-Stephens Company, application for refund.

DEAR SIR: I have been hoping to hear from you with a favorable conclusion on this application since I wrote you sending brief, a month or more ago. I realize, of course, that you are very busy, but the amount involved is considerable to our little company and it is about the last thing that is involved before the practical winding up of the company, and I should be very glad if we could get this out of the way during the present year.

229

Yours very truly,

WDB/S.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, December 19, 1919.

Address reply to Commissioner of Internal Revenue and refer to
IT:T:PS.
LWJ-34,752,925.

Messrs. WASHBURN, BAILEY AND MITCHELL,
Attorneys for Alworth-Stephens Company,
Alworth Building, Duluth, Minnesota.

SIRS: Your brief in support of the application of the Alworth-Stephens Company for the refunding of tax for the year 1917 has received the careful consideration of this office, but it is unable to assent to the proposition contended for by you. The Bureau of Internal Revenue has consistently ruled that under the acts of 1913 and 1916 a mining lease is not entitled to a deduction on account of depletion of ore deposits. The question is now in litigation and you will appreciate that pending a final determination by the courts the present ruling must be adhered to. The basis of this ruling is, as you know, that the allowance for depletion depends on ownership of the ore in place and that leases, such as the kind under which the Alworth-Stephens Company holds, are not conveyances to the lessee of the ore in place.

You are, therefore, advised that the assessment under the provisions of section 201 of the act of October 3, 1917, with relief under the provisions of section 210 of that act, as detailed in the department's letter dated September 3, 1918, resulting in an additional tax of $17,128.44, is correct.

Respectfully,

G. V. NEWTON,
Acting Assistant to the Commissioner.

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DECEMBER 29TH, 1919.

Hon. ROBERT N. MILLER,
General Solicitor,
Washington, D. C.

Alworth-Stephens Company, application for refund.

MY DEAR MR. MILLER: I ask that this letter receive your personal attention. Whoever opens it, refer it direct to you.

After some eighteen months of more or less desultory correspondence between the Alworth-Stephens Company and the Internal Revenue Department about the questions involved here, and some six months after a demand for payment of an extra tax and the filing of a protest by the Alworth-Stephens Company, in which correspondence nearly every reply was received from some different chief of division, I came to Washington in October and attempted to take this matter up with the last chief of division who had written concerning it. I was referred back and forth between seven or eight chiefs of division and accountants, etc., and seemed unable to get anywhere. I then went to Mr. Roper himself and stated my case, and he immediately said that he thought that we were entitled to allowance for depletion. I told him I wished to take the matter up with someone who had the power to and would act. He referred me to Mr. Talbert and said that if necessary he (Mr. Roper) would take the time to go over the matter again personally. I then took Mr. Roper's note to Mr. Talbert, and on a statement of the case and his going over the files, he also agreed that in his opinion we were entitled to allowance for depletion, but said that that was not according to the regulations, but that he thought that the regulations would have to be modified, in the interest of justice and fairness. He thereupon caused to be prepared a statement of the facts, with, as I understood it, a recommendation for the allowance of a refund in something over $24,000 and approved this, but stated that inasmuch as it would involve some modification of their regulations, it would have to receive your approval, but said that he would be willing to follow the matter along and see that it was gotten to a head and to try to get the final decision within a reasonable time, which he intimated might be two or three weeks. Mr. Callan's approval was also obtained, after I had interviewed him.

I therefore understood that the matter was up to you for
231 final action and told Mr. Talbert I would like to see you, with the hope of getting the matter to a head while I was there. He said there was no objection to my seeing you, although he thought you might not want to act at once and possibly you would want a conference with him or with Mr. Roper. I then arranged an appointment to see you, and, as you will doubtless remember, a statement and recommendation which Mr. Talbert had gotten up was in your hands at the time of my interview with you, and you went over it rather hurriedly in connection with my statement of the case to you. You assured me, immediately upon my statement of the case, that I

need not argue to you the justice or the equities of the claim; that you were entirely satisfied on that point, but told me that the only point that you were concerned with was whether there was anything in the adjudicated cases which would prevent or was in conflict with the department's adopting a modification of the regulations so as to permit this refund. You asked that upon returning home I prepare and submit to you a brief covering that single point, and assured me that upon its receipt you would have it examined in your department with reasonable promptness and would yourself personally go over it and consider it. You mentioned that there were cases pending involving in substance this question, and I asked you whether that meant that the decision in this matter would have to await the outcome of those cases, and you assured me very positively that it would not, but that if there was nothing in the adjudicated cases to prevent it, a decision would be made without awaiting the outcome of any other case, as you stated that if an erroneous regulation and ruling existed it should be corrected without waiting upon litigation.

Immediately upon my return home, I prepared a brief, which I am thoroughly convinced demonstrated clearly that there was not only nothing in the adjudicated cases which prevented the adoption of a ruling allowing this refund, but further indicated that such a ruling allowing the refund would be proper under the law existing in 1917. This brief I sent you in a letter dated October 27th and I have your acknowledgment, dated October 30th, in which you say, "After this application for refund has had careful consideration by this office, I will advise you as to our conclusion." I heard nothing further from you and again wrote you under date of December 1st, asking if it would not be possible for you to take the matter up and come to a conclusion during the current year. I have received no answer to that letter, but the day before Christmas received a letter from Mr. Newton, of which I enclose you a copy. I did not
232 meet Mr. Newton in Washington and supposed that I had, while there, run the gauntlet of everyone with whom it was necessary to confer to reach a conclusion concerning this matter.

I am constrained to believe that the brief which I sent you has in some manner gotten into Mr. Newton's hands without his having full information as to the above facts and situation, and that he has simply given no other attention to it than to advise in his letter what all of us already knew, that under the previous rulings of the department a deduction had not been allowed under such circumstances. He refers also to the question of litigation, which, of course, both you and I discussed at our interview. My information, from a brief note in the Corporation Trust Company's reports, is that this litigation to which you referred has since been decided by the District Court of Ohio in favor of the refund for which contention was made, although I am not advised as to the basis upon which the claimant there was suing or as to the line of argument which they adopted, but I judge from the report that substantially the same point was involved.

As above stated, I believe that Mr. Newton's letter must have been written through some misunderstanding between you and his office, for otherwise I think you will agree with me that on the above facts I would hardly have had considerate treatment, in view of the understanding at the time I left your office. I therefore believe that Mr. Newton's letter must have been written without appreciation or an understanding of the situation and, simply in the routine of office work, adhering to previous rulings.

I realize, of course, that you are very busy and that with the multitude of things to occupy your attention oversights are bound to occur, but I ask you if you will not, on receipt of this, in some way give it your personal attention and see if this can not be brought to a speedy and just conclusion at once. The amount involved is not large, of course, as you handle figures, but it is a very large amount to this little company and is practically the only thing that prevents the closing up of the affairs of the company.

Wishing you the compliments of the season, I am,

Yours very truly,

W. D. BAILEY.

WDB/S.

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TREASURY DEPARTMENT,
Washington, December 19, 1919.

IT:T:PS.
LWJ-34, 752,925.

Messrs. WASHBURN, BAILEY AND MITCHELL,
Attorneys for Alworth-Stephens Company,
Alworth Building, Duluth, Minnesota.

SIRS: Your brief in support of the application of the Alworth-Stephens Company for the refunding of tax for the year 1917 has received the careful consideration of this office, but it is unable to assent to the proposition contended for by you. The Bureau of Internal Revenue has consistently ruled that under the acts of 1913 and 1916, a mining lease is not entitled to a deduction on account of depletion of ore deposits. The question is now in litigation and you will appreciate that pending a final determination by the courts the present ruling must be adhered to. The basis of this ruling is, as you know, that the allowance for depletion depends on ownership of the ore in place and that leases, such as the kind under which the Alworth-Stephens Company holds, are not conveyances to the lessee of the ore in place.

You are, therefore, advised that the assessment under the provisions of section 201 of the act of October 3, 1917, with relief under the provisions of section 210 of that act, as detailed in the department's letter dated September 3, 1918, resulting in an additional tax of $17,128.44, is correct.

Respectfully,

(Signed) G. V. NEWTON,
Acting Assistant to the Commissioner.

DEPARTMENT OF JUSTICE,
OFFICE OF SOLICITOR OF INTERNAL REVENUE,
Washington, D. C., January 7, 1920.

W. D. BAILEY, Esq.,
Alworth Building, Duluth, Minnesota.

MY DEAR MR. BAILEY: I am in receipt of your letter of December 29, 1919, in regard to the Alworth-Stephens Company application for refund. The letter of Mr. Newton, dated December 19, 1919, setting forth the ruling of the department in this matter, being of an administrative character, was properly issued by him rather than by me. It was based upon advice received from me and expresses the conclusion which I was forced to reach in considering this question. When you were here, I promised that you should hear from the office of the commissioner in answer to your letter. It is the function of the commissioner and his administrative assistants to give rulings. My only function is an advisory one to the commissioner, and for me to have written you direct announcing a ruling would have been to interfere with the duties of the proper administrative officials. I have given your brief full consideration but am of the opinion that the ruling of the department is a correct interpretation of the law. This question is now before the court and pending a final determination the department is not in a position to change its previous ruling unless the same is clearly wrong. I am satisfied that such is not the case.

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I am sorry not to have made it plain to you that the ruling on this question would necessarily come from the administrative officers of the Bureau of Internal Revenue, my function as an officer of the Department of Justice being limited to advising them.

Very truly yours,

ROBERT N. MILLER,
Solictor of Internal Revenue.

RNM:W.

OCTOBER 27TH, 1919.

Hon. ROBERT N. MILLER,
General Solicitor, Department Internal Revenue,
Washington, D. C.

Re: Alworth-Stephens Company, application for refund 1917 taxes.

MY DEAR MR. MILLER: When I was in Washington last week, you requested that on my return home I write you a brief or memorandum upon the decided cases as applying to our application for refund on the ground of depletion in the Alworth-Stephens 1917 income and excess profits tax payment.

I have done so and herewith enclose you such brief. I believe that it hits the point and hits it directly and simply on a line that is absolutely clear and as against which there is absolutely nothing in the decided cases which prevents the application of the rule for which we contend, but on the contrary that

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the decided cases clearly indicate that this construction is justified by the law.

I trust that you will agree with me and that I may therefore receive from you in the very near future a favorable conclusion upon this application. Should there be anything more that you desire me to do, I shall be glad to do it, but believe that this brief covers the point.

Yours very truly,

WDB/S.

(Endorsed:) Plaintiff's Exhibit 5, filed in U. S. District Court on June 6, 1921.

PLAINTIFF'S EXHIBIT 6

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, August 26, 1919.

Address reply to Commissioner of Internal Revenue, and refer to
IT : T : PS.
WJK–34752925.

ALWORTH-STEPHENS COMPANY,
1607 Alworth Building, Duluth, Minnesota.

SIRS: Reference is made to your letter of August 5, 1919, in response to the department's letter dated July 28, 1919. However, the following information is desired:

State what valuation was placed upon the leases as at the dates, March 1, 1913, and January 1, 1917, respectively.

State the number of units in the mines as at the date mines were taken over on lease by your corporation, and the number of units remaining in the mines as at January 1, 1917.

236 In order that the audit of your returns may be expedited you are requested to furnish the desired information promptly upon receipt of this letter.

It is important that reference be made in your reply to the above initials and serial number.

Respectfully,

J. H. CALLAN,
Assistant to the Commissioner,
By H. C. WESTON,
Chief of Section.

IT : T : PS.
WJK–34752925

AUG. 29TH, 1919.

J. H. CALLAN,
Assistant to the Commissioner of Internal Revenue.
Washington, D. C.

DEAR SIR: In reply to your favor of the 26th inst. will say that our Mr. O'Donnell, who has been looking after this matter, is out of

the city and will return Sept. 1st, at which time your letter will be laid before him.

Yours very truly,

THE ALWORTH-STEPHENS COMPANY,
By GEO. W. HART, *Ass't Treas.*

GWH-FC.

Your file:
IT : T : PS.
WJK-34752925.

SEPTEMBER FOURTH, 1919.

Mr. J. H. CALLAN,
Assistant to the Commissioner,
Internal Revenue Department, Washington, D. C.

DEAR SIR: Responding to your department's letter of August 26, 1919, in reply to our letter of August 5, 1919, the following questions outlined in your department's letter and the answers thereto are submitted:

237 Question: State what valuation was placed upon the leases as at the dates, March 1, 1913, and January 1, 1917, respectively.

Answer:

March 1, 1913, present royalty value—	
Perkins, lease #1	$184,768.18
Hudson, " #2	210,674.53
Total	$395,442.71
January 1, 1917, present royalty value—	
Perkins, lease #1	$107,129.25
Hudson, " #2	41,096.76
Total	$148,226.01

Question: State the number of units in the mines as at the date mines were taken over by your corporation, and the number of units remaining in the mines as at January 1, 1917.

Answer:

Estimated tonnage merchantable ore beginning of operations, 1909—		
Perkins, lease #1	776,324	tons
Hudson, " #2	1,299,586	"
	2,075,910	
As of January 1, 1917—		
Perkins, lease #1	300,000	tons
Hudson, " #2	163,706	"
Total	463,706	tons

Yours very truly,

ALWORTH-STEPHENS COMPANY,
By FRANK J. O'DONNELL.

FJO'D-R.

(Endorsed:) Plaintiff's Exhibit 6, filed in U. S. District Court on June 6, 1921.

238 PLAINTIFF'S EXHIBIT 7

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, June 11, 1919.

Address reply to Commissioner of Internal Revenue and refer to
IT:T:SM.
WJK–34752925.

ALWORTH-STEPHENS CO.,
1607 Alworth Building, Duluth, Minn.

SIRS: A preliminary examination of your income and excess profits tax returns for the taxable period ended December 31, 1917, indicates that you have computed your excess profits tax at the eight per cent rate on the basis of a nominal capital. In order that this department may have the necessary facts, the following information is required:

Kindly furnish a detailed explanation of the nature of the two leases and sub-leases, showing in particular the names, addresses, amounts, basis on which commissions earned, etc., with any other information that you believe would be of help to the department in considering your case under section 209.

Please state who would be responsible for any losses that might occur.

A list of the names and holdings of the stockholders, together with position, if any, held in the company.

If the business employed no capital as such during the taxable period, state whether it was during that period dependent upon the supply of substantial credit.

You are advised that it is absolutely essential that you furnish this department with a statement of your assets and liabilities as at the beginning and end of the taxable period, which should be as correct as possible. If the information cannot be obtained from your records, a statement based upon the best of your knowledge and belief will be considered.

239 Apparently no deduction has been made for salaries of officers. If a deduction under this heading has already been made, advise the amount thereof and where it is deducted. If no deduction has been made, advise the amount which, in your opinion, represents a fair and equitable compensation for the services actually rendered.

You are requested to give this matter your prompt attention. It is important that reference be made in your reply to the above initials and serial number.

Respectfully,

J. H. CALLAN,
Assistant to the Commissioner,
By E. H. MALING,
Chief of Section.

Referring to:
1T: T: SM.
WJK—34752925.

JUNE 16TH, 1919.

Hon. J. H. CALLAN,
Assistant to the Commissioner,
Internal Revenue Department, Washington, D. C.

SIR: Replying to your letter of June 11, respecting the income and excess profits tax return of the Alworth-Stephens Company for the year ending December 31, 1917:

We beg to refer you to statements contained in our correspondence with your department under dates of—

May 28, 1918,
July 19, 1918,
September 9, 1918,
October 30, 1918,
February 21, 1919,

as well as those statements contained in our claim for refund filed in April, 1919.

The statements herein referred to answer practically all the questions you ask.

240 The following is a list of the shareholders of the nominal capital:

A. L. Stephens	41⅔	shares.	
M. H. Alworth	26¼	"	(Treasurer.)
W. C. Agnew	25	"	
J. L. Washburn	15	"	(President.)
D. B. McDonald	12½	"	
Jane Campbell Mould	11⅔	"	
R. D. Alworth	10	"	
Geo. W. Hart	10	"	(Asst. treas.)
Sarah M. Stephens	10	"	
M. W. Alworth	10	"	
W. D. Bailey	7½	"	
Oscar Mitchell	7½	"	
Henry Stephens	6⅔	"	(Vice pres.)
Gail Stephens	6⅔	"	
Jacquelin Stephens	6⅔	"	
Richard Webb	6¼	"	
J. D. Lamont	6¼	"	
E. G. Bush	6¼	"	
Alice M. Cole	6¼	"	
Phoebe C. Fregeau	6¼	"	
Alma P. Washburn	5	"	
Lillian F. O'Donnell	2½	"	
Julia G. Washburn	2½	"	
Mildred B. Washburn	1⅔	"	
	250	shares	

At $100 par value.

As to leases: The lands were first held under option contract. Having arranged to sub-lease the same, leases were taken out and sub-leases made. They are ordinary iron-mining leases authorizing removal of ore and payment therefor of stipulated royalty.

The company has no assets or liabilities, no losses, no losses or requirements for credit. The files of your office should show our return and payment thereon; a considerable correspondence as aforesaid; the demand for and levy of additional taxes; our protest against the same and payment under protest, as weil as our application for refund.

Your letter leads us to believe these papers have not been examined by you.

241 Your attention thereto is respectfully invited.

Yours truly,

ALWORTH-STEPHENS COMPANY,
By J. L. WASHBURN, *President.*

(Endorsed:) Plaintiff's Exhibit 7, filed in U. S. District Court on June 6, 1921.

PLAINTIFF'S EXHIBIT 8

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, July 3, 1919.

Address reply to Commissioner of Internal Revenue and refer to:
IT:T:SM.
WJK–34752925.

ALWORTH-STEPHENS CO.,
1607 Alworth Bldg., Duluth, Minn.

SIRS: Reference is made to your letter of June 16, 1919, in response to the department's letter dated June 11, 1919, relative to your income and excess profits tax returns.

A search of the department's files fails to locate the following correspondence referred to in your letter: May 28, 1918, July 19, 1918, September 9, 1918, and October 20, 1918.

It is therefore requested that this office be supplied with copies of the above in order to have all the necessary information for the purpose of making correct audit of your returns.

You are requested to give this matter your prompt attention. It is important that reference be made in your reply to the above initials and serial number.

Respectfully,

J. H. CALLAN,
Assistant to the Commisioner.
By G. W. JUDD,
Acting Chief of Section.

242 IT:T:SM.
WJK–34752925.

JULY 8TH, 1919.

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

DEAR SIR: Complying with the request made by your department in its letter of July 3, we are enclosing copies of this com-

pany's correspondence with your department on the followin dates:

May 28, 1918.
July 19, 1918.
Sept. 9, 1918.
Oct. 20, 1918.
Feb. 21, 1919.

Yours very truly,

ALWORTH-STEPHENS COMPANY,
By FRANK J. O'DONNELL.

FJO'D–R.
Enc.

(Endorsed:) Plaintiff's Exhibit 8, filed in U. S. District Cou on June 6, 1921.

PLAINTIFF'S EXHIBIT 9

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington.

Address reply to Commissioner of Internal Revenue and refer to
IT:T:SM.
WJK–34,752,925.

ALWORTH-STEPHENS COMPANY,
1607 Alworth Building, Duluth, Minn.

SIRS: Reference is made to your letter of July 8, 1919, in respons to the department's letter dated July 3, 1919.

You are advised that it is essential that you furnish thi
243 department with a copy of the lease between the owners of th mine and the Alworth-Stephens Company, as well as copies o lease between the Alworth-Stephens Company and the certain minin companies who were operating the mines during the taxable yea ending December 31, 1917.

You are requested to give this matter your prompt attention. I is important that reference be made in your reply to the abov initials and serial number.

Respectfully,

J. H. CALLAN,
Assistant to the Commissioner,
By E. H. MALING,
Chief of Section.

AUGUST 5TH, 1919.

Referring to
IT:T:SM.
WJK–34,752,925.

J. H. CALLAN,
Assistant to the Commissioner, Washington, D. C.

SIR:—Complying with the request made by your department i its letter of July 28th, we are enclosing you copies of the following

mining leases: Two mining leases from Henry Stephens et al. to the Alworth-Stephens Company, one mining lease from the Alworth-Stephens Company to Syracuse Mining Company, one mining lease from the Alworth-Stephens Company to John S. Lutes, and one assignment by John S. Lutes and wife to the Perkins Mining Company.

The above leases cover, I believe, all the leases held by this Company and will undoubtedly furnish the information which your department is seeking.

Yours truly,

THE ALWORTH-STEPHENS COMPANY.
By FRANK J. O'DONNELL, *Asst.*

FJO'D–FC.
Enc.

(Endorsed:) Plaintiff's Exhibit 9, filed in U. S. District Court on June 6, 1921.

244 PLAINTIFF'S EXHIBIT 10

FEBRUARY 21, 1919.

To the honorable the INTERNAL REVENUE COLLECTOR for the District of Minnesota.

The undersigned, Alworth-Stephens Company, a corporation organized under the laws of Minnesota, having been demanded by you to pay the sum of $17,128.44 on or before February 24, 1919, as income and excess profits tax for the year 1917 in addition to all such taxes heretofore paid, in obedience to such demand and to save itself from the penalties in said demand threatened to be imposed if such payment be not made does now and herewith transmit to you as such collector a certified check upon the Northern National Bank of Duluth for said sum, protesting however in making such remittance that said tax and the said demand for said payment are unlawful, unjust and arbitrary, and that this corporation has heretofore timely and without default paid its full and proper amount of such taxes and made due returns in respect thereto.

I.

This Company so protesting alleges that its sole business for years has been the collection of receipts from its lessees under certain iron mining leases or contracts, upon lands for which it holds mining leases or contracts from the owners thereof, and paying over to such owners the amounts per ton due to them under such contracts and distributing the remainder less taxes and petty incidental expenses to its members or shareholders, consisting for the most part of a large number of small share owners, this business being transacted by its officers without compensation. That this company in deference to the regulations of the Treasury Department has always recognized itself as being in business and that the entire difference between the amount of royalty received by it and the amount paid to the owners of the land is income and has consistently returned

the same as such, without deduction for depletion altho its small ore bodies were being rapidly exhausted and have now at this time been nearly and in one case entirely exhausted.

That this company has only a nominal capital, in fact no capital at all invested. That only $25,000 was ever called or paid in of its authorized capital, most of which was expended in certain explorations about ten years ago, and in connection with making of its leases or mining contracts was returned to it and distributed to its stockholders soon after the organization of the company, the
245 issuance of said shares being allowed to stand as a basis of distribution.

That when all of the remaining ore is mined out and paid for, and the receipts therefrom distributed in like manner, said shares will represent no further value or capital.

That for the year 1917 this company calculated and returned its income taxes as above set forth under the law and in addition thereto calculated and returned its excess profits tax upon such income derived as aforesaid under section 209 of title 2 of the war excess profit tax law, calculating the later tax as authorized by said section in case of a domestic corporation in a trade or business having no invested capital or not more than a nominal capital, at eight per centum of its net income derived as aforesaid in excess of the deduction of $3,000, and paid in full the sum of $10,253.21, of which $5,960.47 was excess profits tax, and $4,292.74 was the normal income tax, which your protestant declares was the full amount required or authorized by law to be levied upon or assessed against this company, and which was the amount assessed against it for said year 1917 upon its full and true returns duly made, and that the further demand now made for the payment of the sum herewith remitted is unauthorized by law, unjust, arbitrary and confiscatory.

II

Without waiving the foregoing in any manner and still insisting thereon, this company further protesting declares that notwithstanding the clear provisions of said section 209 and its application to the facts of this case and to this company, your department has refused to advise this company as to the manner in which the additional tax now demanded is arrived at, except that it denies the application of said section 209 to this company and advises that it has applied section 210 of said law to this company.

This company therefore here declares that the department therefore treats this company as a company with invested capital, and so treated this company is entitled to have the full value of its assets, capital, and surplus as of March 1, 1913, less depletion by subsequent mining operations considered as its capital and that the sums received by it under the method applied in such cases should be deemed in part a return of capital, and the taxes assessed accordingly, and that so calculated and assessed this Company has already

heretofore paid more taxes than could lawfully be assessed
246 against it for said year 1917, and is entitled to a rebate and repayment of a large portion thereof, and therefore protests that the department must pursue either the one course or the other, and if it denies to this company the application of said section 209, it can not lawfully demand the payment of any further sum than heretofore paid, and this additional assessment is arbitrary and unlawful.

In making the payment demanded under protest as this corporation does, it gives notice that it will appeal to the Commissioner of Internal Revenue in the manner permitted by law and the regulations, and apply for the repayment to it of the moneys thus exacted and collected from it unlawfully.

February 21, 1919.

Respectfully,

ALWORTH-STEPHENS COMPANY,
(Signed) By J. L. WASHBURN, *President*,
and H. C. STRONG, *Secretary*.

(Corporate seal.)

(Endorsed:) Plaintiff's Exhibit 10, filed in U. S. District Court on June 6, 1921.

PLAINTIFF'S EXHIBIT 11

Note: It is important that your reply be addressed Commissioner of Internal Revenue, Tax Reviewers, Washington, D. C.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, October 22, 1918.

Address reply to Commissioner of Internal Revenue and refer to
ALWORTH-STEPHENS COMPANY,
1607 Alworth Building, Duluth, Minnesota.

DEAR SIRS: Replying to your letter of September 9, 1918, relative to your income and excess profits tax returns for the year 1917,
247 you are advised that after careful consideration of the additional information submitted, this office is of the opinion that assessment must be made at the graduated rates provided for by section 201 of the law.

Section 209 is limited by article 71 of the war excess profits tax regulations to apply primarily to "occupations, professions, trades, and businesses engaged principally in rendering personal service in which the employment of capital is not necessary and the earnings of which are to be ascribed primarily to the activities of the owners." Your company comes rather within paragraph (c) of article 74, namely, a business having a substantial capital, but whose invested capital within the meaning of section 207 is reduced to a nominal amount by the operation of the restrictive clauses of that section. The capital in this case consists of a small amount of cash paid in (claimed to have been withdrawn, but as the capital stock is still

carried as fully paid, presumably profits equal in amount to
capital were in fact withdrawn), which has since appreciate
value.

Under all of the circumstances, it is believed that you are ent
to relief under section 210, and the assessment has been comp
thereunder. You are advised that the percentage deduction allo
was $16,291.03, which together with the specific deduction
$3,000.00, makes a total deduction of $19,291.03.

This tax is equivalent to a tax assessed upon the basis of a
vested capital of $181,011.45. Your attention is called, howeve
the fact that section 210 makes no provision for computing the
tal, and the capital constructed under article 18 of regulations
41 is only an incident in the assessment of the tax. In other wo
the amount of capital stated above should not be used either
basis of making any changes in the books of the company o
making any future returns.

Respectfully,

DANIEL C. ROPER, *Commissione*

HMS–LMP.

(Endorsed:) Plaintiff's Exhibit 11, filed in U. S. District C
on June 6, 1921.

248 PLAINTIFF'S EXHIBIT 12

OCTOBER 30TH, 191

COMMISSIONER OF INTERNAL REVENUE,
Tax Reviewers, Washington, D. C.

DEAR SIR: This office is in receipt of your letter of October 22,
relative to the manner and method used by this corporation in
ing up its income and war excess profits tax returns for the
1917, wherein you state that notwithstanding the additional in
mation submitted to your department, in our letter of Septembe
1918, you still hold to the opinion that assessment must be mad
the graduated rates provided for in section 201 of the law.

Your letter is, in view of the facts submitted, and in view of
additional fact that our properties are almost exhausted, a dis
surprise as well as a very keen disappointment.

We have carefully gone over again section 201, 210, and 209 of
law, and it is still our firm and honest conclusion that this corp
tion is entitled to relief under section 209, instead of section 21
stated in your letter.

With this belief firmly placed in our minds, we do not cle
understand your department's methods of procedure in compi
the figures submitted in your letter of October 22nd, and wish
before any attempt is made to levy the additional tax, as outline
your letter of September 3rd, 1918, you would send us a copy of
working papers, in order that we may more clearly understand
manner in which your figures are worked out.

May I also ask, in view of the fact that the construction you propose to make, will practically wipe this company out, whether the question of the application of the law to the facts in the case might not be submitted summarily upon order to show cause to the Federal court here, whose determination we should deem binding without appeal?

We feel that we should have a right to a hearing before being ordered to pay.

We will cheerfully submit all the facts and are willing to speed the procedure.

249 Your prompt acknowledgment of the request contained herein will be greatly appreciated.

Yours very truly,

ALWORTH-STEPHENS COMPANY,

(Signed) By J. L. WASHBURN, *President.*

FJO'D–R.

Note: It is important that your reply be addressed Commissioner of Internal Revenue, Tax Reviewers, Washington, D. C.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, November 21, 1918.

Address reply to Commissioner of Internal Revenue and refer to
Nov 23 Rec'd

ALWORTH-STEPHENS COMPANY,
1607 Alworth Building, Duluth, Minnesota.

DEAR SIRS: Replying to your letter of October 30th, a careful re-examination has been made of your return in the light of statements contained in your letter. As a result of this reconsideration, this office is still of the opinion that you are engaged in a business the nature of which requires the investment and employment of capital. It is true that the peculiar circumstances in your case make the computation of the invested capital difficult and uncertain, and for that reason assessment has been made in accordance with the provisions of section 210 of the law, which was enacted for the purpose of making a fair and equitable assessment in the case of a taxpayer whose invested capital cannot be satisfactorily determined.

The method by which this assessment has been made is outlined in office letter to you of October 22nd, 1918, and having regard to the limitations placed upon the Treasury Department in respect of disclosing information regarding the returns of taxpayers, it is not practicable to give any further details as to the respective taxpayers with whom you have been compared.

250 With respect to your claim that this tax "will practically wipe this company out" it is perhaps sufficient to state that of the net income for the year 1917 of $77,505.99, the excess profits tax amounts to $24,182.22, and the income tax to $3,199.43 or a total of

$27,381.65, leaving as net income for the year after the payment of taxes, the sum of $50,124.33.

Yours respectfully,

L. J. SPIER, *Acting Commissioner.*

(Endorsed:) Plaintiff's Exhibit 12 filed in U. S. District Court on June 6, 1921.

PLAINTIFF'S EXHIBIT 13

Note: It is important that your reply be addressed Commissioner of Internal Revenue, Tax Reviewers, Washington, D. C.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, July 11, 1918.

Address reply to Commissioner of Internal Revenue and refer to
Rec'd 7/15.

ALWORTH-STEPHENS COMPANY,
1607 Alworth Building, Duluth, Minn.

GENTLEMEN: A preliminary examination of your income tax return shows that you have failed to file Form 1103, Excess profits tax return. You are requested to fill out this form (copy enclosed) with all completeness possible and forward same to this office, attaching balance sheets showing assets and liabilities for the beginning and end of the taxable year.

It is noted that you have computed the tax on the basis of a nominal invested capital. In order that this office may have complete information will you kindly describe in detail the kind of business conducted, together with the reasons why you think you should be assessed at the eight per cent rate.

251

Is it customary for you to make loans to principals?

Are the principal owners actively engaged in the conduct of the buisness, and, if so, what portion of their total time is so spent?

It is noted that you have not deducted an amount for salaries under question 4 (b) of Form 1031. Are these salaries deducted elsewhere in your return? If they are not deducted, what, in your opinion, would be a reasonable compensation for the services rendered?

In preparing Form 1103 your particular attention is directed to the information called for with regard to invested capital. It is necessary that all questions relating thereto be fully answered in accordance with the law and regulations.

In view of the necessity for determining promptly the final assessment of this tax, you are requested to furnish the above information immediately upon receipt of this letter if possible, or, in any event, within five days. In your reply please refer to WCE–P—No. 34752925.

Respectfully,

DANIEL C. ROPER, *Commissioner.*

RFP–E.
ES

C. E.—P–34,752,925.

JULY 19, 1918.

MMISSIONER OF INTERNAL REVENUE,
Tax Reviewers, Washington, D. C.

DEAR SIR: Your letter of the 11th instant requesting certain in-rmation and facts supplemental to this corporation's income tax urn covering the taxable year ending December 31, 1917, was eived by this office under date of July 15th.

Responding to the inquiries contained therein, we are enclosing herewith balance sheets showing assets and liabilities at the ginning and end of the taxable year, also Form 1103 filled out to extent of showing amount of income subject to the excess profit tax, and supplementary sheet setting forth our reasons why we believe we should be classed as a "nominal capital business" and assessed at the rate allowable thereunder, namely 8% all income in excess of $3,000.00.

Referring to paragraphs 3 and 5 in your letter, desire to advise that this corporation has never at any time made loans to of its principals and it has never made any deductions for aries paid, under question 4B, Form 1031, for the reason that the rk of carrying on this corporation's business has always been done its officers without salaries or compensation in any form.

Trusting that the facts and figures supplied herewith furnish you th all the information necessary for determining promptly the cor-t basis for final assessment of the tax in question, we beg to remain,

Very truly yours,

ALWORTH-STEPHENS CO.,
By M. H. ALWORTH, *Treasurer.*

O'D–R.
c.

te: It is important that your reply be addressed Commissioner f Internal Revenue, Tax Reviewers, Washington, D. C.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, September 3, 1918.

dress reply to Commissioner of Internal Revenue and refer o JCP.

WORTH-STEPHENS COMPANY,
1607 Alworth Building, Duluth, Minn.

DEAR SIRS: An examination of your excess profits tax return has ulted in certain corrections by this bureau. The amount of the ess profits tax, subject to revision by field examination, and the ount of the income taxes, determined upon the basis of the corrected excess profits tax return, are as follows:

Excess profits tax as corrected	$24,182.22
Income taxes as adjusted	3,199.43
Total	27,381.65

If the total stated above is less than the amount of the income and excess profits taxes already assessed, you are advised to file with the collector for your district a claim for refund (Form 46) of the amount actually paid in excess of such total.

If the total stated above is greater than the amount of the income and excess profits taxes already assessed, a further assessment will be made, notice of which will be sent you by the collector for your district.

The items as to which corrections have been made are shown below:

Assessment made under the provisions of sec. 210 and articles 18, 24 and 52 of regulations 41.

Respectfully,

DANIEL C. ROPER, *Commissioner.*

J. L. WASHBURN,
1600 ALWORTH BUILDING,
Duluth, Minn., September 9, 1918.

For consideration Tax Reviewers.
J. C. P.

The Honorable DANIEL C. ROPER,
Commissioner of Internal Revenue,
Treasury Department,
Washington, D. C.

DEAR SIR: Your letter to this company dated September 3rd is before us. This letter is such as to cause not only surprise but consternation, for if the demand made in it were complied with the company would not have receipts enough to meet it. We want to call your attention to several things:

(1) This company has always paid income taxes upon the difference in the rate per ton for ore mined by its sublessees and the amount it had to pay to the owners of the fee for the ore so
254 taken out, altho such mining rapidly exhausted the leasehold estate. So rapid has been the exhaustion of these small ore bodies that the amount to come hereafter will be nominal. In all this the company admittedly recognized the correctness of the Government's attitude that this company was in business and all that it received net was to be treated as gains of business.

(2) Your attention is again directed to the explanatory statement contained in the supplemental sheet to the income and war tax report presented by this company wherein it clearly appears that this company has not for years had anything except a nominal capital invested, in fact no capital at all, and the business being done by the officers without salary, so that the Government under the returns as made derived the war tax of 8% upon the income as fully as upon the income of an individual.

(3) We submit that the facts do not present a case for graduated scale of taxes, and your letter points out nothing in the way of an attempt to fix the amount of capital invested to furnish a foundation

for assessment under sec. 201–203 or 210, but the case falls clearly under sec. 209.

(4) The assessment is therefore arbitrary and confiscatory, and will require substantially the whole net receipts of the company this year and nearly the whole exhaustion of its leasehold estate to liquidate it.

We are constrained to entertain the belief that some mistake has been made. We earnestly ask that the matter be reveiewed and the assessment not made. We point to the record of this company that in the past every doubt has been solved in favor of the Government, and that in the large payment made for last year, this company has discharged its full share of war tax burdens.

Respectfully,

ALWORTH-STEPHENS COMPANY,
By (signed) J. L. WASHBURN, *President.*

SUPPLEMENTAL SHEET—INCOME TAX RETURN, 1917—ALWORTH-STEPHENS COMPANY

This company was organized September 20th, 1907, with a capital stock authorized, of $100,000.00.

It took an option to drill and explore for iron ore on certain lands in St. Louis County, Minnesota, and as fast as the money for said drilling and exploring expenses was needed, calls were made and stock issued for the amount of money thus paid in. This work discovered one small mine, and under a sub-exploratory contract another company discovered another small mine. Leases were taken out by the Alworth-Stephens Company on these and subleases made, and all the monies expended by the last named company were returned to it in consideration thereof in addition to an increased royalty, therefore it had, in fact, no capital invested.

As this company had, prior to sub-leases, called in $25,000.00 of its authorized capital and issued stock therefor, that sum was allowed to stand as the nominal capital, and no further stock was issued; and although the amount called in was soon returned to the stockholders, the said issued stock was allowed to stand as a basis for further distribution.

It was then, and is now, clearly understood by the stockholders of this corporation that the $25,000.00 paid in by them was returned to them in the first year of the life of the leases in question and that when the present bodies of ore are exhausted, the aforesaid leases shall be cancelled, the stock of the corporation will have no further value and no further payments will be made to the stockholders on account of same. All other land held under the exploratory contract have long since been released, as no ore was found thereon; in other words, when this corporation winds up its affairs, which fact will transpire within the next three or four years, or possibly sooner, owing entirely to the rapid rate of exhaustion of the ore bodies, no further return will, or can be made, to its stockholders on account of

the stock they may thus hold, their original expenditure of $25,000.00 which their stock represented having long since been returned to them.

This company's only revenue therefore is derived from the payments due for ore mined under the aforesaid mining contracts or leases and its only business is the collecting of said payments, paying over the proper proportion to individuals owning the fee and distributing the balance to its stockholders; and it is desired to state here that this company has always paid an income tax on the difference between the amount of royalties received and the amount paid to the owners of the fee.

It has no expense other than those occasioned by the payment of income and other taxes to our Government, for the reason that all duties necessary and incidental to the collecting of the aforesaid payments and to the keeping up of the corporate records, as
256 stated elsewhere, are now and always have been performed by the officers of this corporation (who are themselves among the principal stockholders of the corporation as well), without salaries or compensation in any form whatever.

From the foregoing facts, it must be evident to your department that this corporation is engaged in a business in which the employment of capital is unnecessary and in which no capital is now employed and because of such fact, this corporation deems itself to come strictly within the class of businesses termed "nominal capital businesses" and believe therefore that the excess profits tax to be assessed against the income derived from its business should be computed at the 8% rate prescribed by section 209 of the law.

Alworth-Stephens Company—Balance sheet as of December 31, 1916

ASSETS

Paid-in capital	$25,000.00	
Cash on hand—Northern Natl. Bank	134.76	

LIABILITIES

Reserve for taxes (Federal)		$134.76
Capital stock issued and outstanding, 250 shares, at $100.00 par value		25,000.00
	$25,134.76	$25,134.76

Alworth-Stephens Company—Balance sheet as of December 31, 1917

ASSETS

Paid-in capital	$25,000.00	
Cash on hand—Northern Natl. Bank	71.66	

LIABILITIES

Reserve for taxes (Federal)		$71.66
Capital stock issued and outstanding, 250 shares at $100.00 par value		25,000.00
	$25,071.66	$25,071.66

257 DEFENDANT'S EXHIBIT AA

Certified copies of corporation income tax returns made by the Alworth-Stephens Company during the years 1909 to 1916

United States of America

TREASURY DEPARTMENT, *May 28, 1921.*

Pursuant to section 882 of the Revised Statutes I hereby certify that the annexed are true copies of corporation income tax return for 1909, including protest; corporation income tax return for 1910; corporation income tax return for 1911; corporation income tax return for 1912; corporation income tax return for 1913, including statement; corporation income tax return for 1914; corporation income tax return for 1915; corporation income tax return for 1916 of the Alworth-Stephens Company, Duluth, Minnesota, on file in this department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary:

J. H. MOYLE,
Assistant Secretary of the Treasury.

(Thesaur Amer., Septent Sigil.)

Treasury Department, Chief Clerk and Superintendent.

Form 66.

258 [Copies of income tax returns during the years 1909 to 1916 omitted in printing.]

259

260 (Endorsed:) Defendant's Exhibit AA, filed in U. S. District Court on June 6, 1921.

DEFENDANT'S EXHIBIT BB

Minnesota Tax Commission

Samuel Lord, Odin Halden, J. G. Armson, commissioners; N. A. Nelson, secretary.

Address all correspondence to Minnesota Tax Commission.

STATE CAPITOL, ST. PAUL, *June 4, 1921.*

I, N. A. Nelson, secretary of the Minnesota Tax Commission, do hereby certify that the statement hereto attached is a true and correct statement of the tonnages and grades of iron ore, the assessed values and rate of assessed value per ton, of the properties therein described for the years 1913 and 1914, as the same appear in the records on file in the office of the Minnesota Tax Commission at the State Capitol in the city of St. Paul, Minnesota.

N. A. NELSON, *Secretary.*

Dated this 4th day of June, 1921.

(Seal of the Minnesota Tax Commission.)

(Defendant's Exhibit BB, filed in the U. S. District Court on June 6, 1921.)

DEFENDANT'S EXHIBIT CC

Statement showing shipment of ore from Hudson and other mines as of May 1, 1913, and May 1, 1914

DATA AS OF MAY 1, 1913

Name and description of property	Sec.	Twp.	Rge.	Estimated tonnage in ground	Analysis of ore (dry)			Assessment	
					Iron (%)	Phos. (%)	Moist. (%)	Rate per ton (cents)	Valuation
Sub.									
Hudson, U. S. lot 4	4	58	15	684, 402	60. 17	. 079	11. 00	. 297675	$203, 661
Silverton, N. ½ NE. ¼	11	59	14	270, 706	56. 26	. 031	9. 50	. 0882	23, 876
Perkins mine, NE. ¼ SW. ¼	26	59	15	390, 575	58. 59	. 071	13. 22	. 253575	99, 040
Perkins res., SW. ¼ NW. ¼	26	59	15	365, 981	54. 74	. 047	13. 00	. 11025	40, 349
DATA AS OF MAY 1, 1914									
Hudson, U. S. lot 4	4	58	15	443, 889	60. 17	. 079	11. 00	. 313	$138, 712
Silverton, N. ½ NE. ¼	11	59	14	270, 706	56. 26	. 031	9. 50	Arbitrary val.	10, 500
Perkins mine, NE. ¼ SW. ¼	26	59	15	270, 563	58. 59	. 071	13. 22	. 266	72, 038
Perkins res., SW. ¼ NW. ¼	26	59	15	365, 981	54. 74	. 047	13. 00	. 116	42, 366

(Endorsed:) Defendant's Exhibit CC, filed in U. S. District Court on June 6, 1921.

262 In United States Circuit Court of Appeals

[Title omitted.]

Appearances of counsel

Filed November 13, 1923

The clerk will enter my appearance as counsel for the plaintiff in error.

LAFAYETTE FRENCH, JR.,
U. S. Atty., Dist. of Minnesota.

[File endorsement omitted.]

(Appearance of Mr. Nelson T. Hartson, Solwicitor of Internal Revenue, as counsel for plaintiff in error)

The clerk will enter my appearance as counsel for the plaintiff in error.

NELSON T. HARTSON,
Solicitor of Internal Revenue.

[File endorsement omitted.]

263 (Appearance of Mr. A. Calder Mackay as counsel for plaintiff in error)

The clerk will enter my appearance as counsel for the plaintiff in error.

A. CALDER MACKAY.

[File endorsement omitted.]

(Appearance of counsel for defendant in error)

The clerk will enter my appearance as counsel for the defendant in error.

J. L. WASHBURN.
W. D. BAILEY.
OSCAR MITCHELL.

[File endorsement omitted.]

United States Circuit Court of Appeals

Argument and submission

May term, 1923

MONDAY, MAY 21, 1923.

This cause having been called for hearing in its regular order, argument was commenced by Mr. A. Calder Mackay for plaintiff in error, continued by Mr. W. D. Bailey for defendant in error, and concluded by Mr. A. Calder Mackay for plaintiff in error.

Thereupon, this cause was submitted to the court on the transcript of the record from said District Court and the briefs of counsel filed herein.

264 In United States Circuit Court of Appeals

[Title omitted.]

Opinion

Filed November 12, 1923

Mr. A. Calder Mackay, special attorney, Bureau of Internal Revenue (Mr. Lafayette French, jr., United States attorney, and Mr. Nelson T. Hartson, Solicitor of Internal Revenue, were with him on the brief), for plaintiff in error.

Mr. W. D. Bailey (Mr. J. L. Washburn and Mr. Oscar Mitchell were with him on the brief), for defendant in error.

Before SANBORN and LEWIS, Circuit Judges, and MCGEE, District Judge

SANBORN, Circuit Judge, delivered the opinion of the court.

This is an action at law. Alworth-Stephens Company, a corporation organized in 1907, hereafter called the plaintiff, originally brought this suit against E. J. Lynch, collector of internal revenue of the United States, for whom after his death his executrix was substituted as defendant, to recover $17,128.44, which, it alleged, the collector unlawfully exacted from it and it paid under protest as a part of its net income and excess profits taxes for the year 1917. The parties set forth their respective claims in proper pleadings, stiplated that the case should be tried by the court, it was so
265 tried, the court made a special finding of the facts and rendered a judgment for the plaintiff, which the defendant challenges by this writ of error.

The finding of facts and the computations of the court below, which it set forth with commendable clearness, accuracy, and patience, are not challenged in this court. From those facts and computations that court deduced the conclusion and adjudged that in ascertaining its net taxable income and excess profits taxes for the year 1917, the plaintiff was lawfully entitled to deduct from the gross amount of its income for that year an allowance of $55,726.80 (representing an overpayment of tax in the sum of $17,128.44) on account of the depletion of the market value, as of March 1, 1913, of its property rights and interest in the Perkins mine and the Hudson mine caused by the extraction and disposition of ores from those mines during the year 1917.

The plaintiff had a lease of the Perkins mine for 50 years made in 1908, under which it was under an obligation to pay to the lessor,

the owner of the mine, 30 cents for each ton of ore taken from the mine and it had subleased the mine in 1908 to one Lutes, who had agreed to pay 75 cents per ton for every ton taken from the mine, and the mine was operated in 1917 by an assignee of Lutes under the lease to him, so that the plaintiff received 45 cents per ton of the ore extracted during that year. It had a lease for 50 years of the Hudson mine made by the fee owners thereof in 1909, under which it was required to pay to the lessors 30 cents per ton for the ore taken from the mine, and in 1909 it had subleased this mine to the Syracuse Mining Company, which had agreed by the terms of the lease to pay to it 60 cents per ton for every ton taken from the mine, and this mine was operated under this lease in 1917.

On March 1, 1913, and at all times thereafter, the plaintiff was the owner of the property interests and rights in these mines evidenced by these leases. On March 1, 1913, these mines had been stripped of their overburden of earth so that the ore therein was ready for mining by the open pit method and the mines had been thoroughly explored so that the tonnage of ore in them was definitely known and it was also known that the ore therein would be mined and the mines would be completely exhausted, as they subsequently were, within 7 years from March 1, 1913. On March 1, 1913, and ever since that date, including the year 1917, the fair
266 market value of the ore in each of these mines and the fair market value in each of the mines of every ton of the products thereof was at least 75 cents per ton. The aggregate amount of all the allowances made on account of the depletion of the market value of its property interests in the two mines to the plaintiff, including the allowance for 1917 made by the court below in this case, was less than the fair market value as of March 1, 1913, of the plaintiff's property interests in the two mines, and the allowances for the year 1917 permitted by the court below in this case do not exceed the fair market value in the mine of the product thereof which was mined, sold, and paid for during the year 1917. This statement is also true of each of the mines and the ore therein taken by itself.

During the year 1917 the plaintiff had no property other than its property interests in these two mines under the leases described and it had no other income than that derived from these mines under these leases. So it was that the market value of the ore in these mines on and at all times after March 1, 1913, was more than 75 cents per ton. The fee owners of the mines, the lessors of the plaintiff, had the first and superior property right and interest therein to the extent, but not exceeding, 30 cents per ton of the ore as extracted. The plaintiff had the second property right and interest superior to that of its lessees to the extent, but not exceeding, 45 cents per ton of the ore as extracted from the Perkins mine and to the extent of, but not exceeding, 30 cents per ton of the ore as extracted from the Hudson mine. The lessees of the plaintiff had the third property right and interest of the ore in these mines as extracted subject to the property rights of the original lessors and of the plain-

tiff. The property rights of these lessees were as absolute, as indefeasible, as enforcible at law and in equity, and more valuable than the property rights and interests of the owners of the titles to the mines, of the lessors of the plaintiff, which interests were limited by the terms of the leases.

The depletion of the market value of the mines and of the ore in the mines by the extraction and sale of the ore therein unavoidably depleted the market value of the property rights and interests in the mines of the respective parties interested in them and in the ore therein in proportion to their respective rights and interests. Every ton of ore extracted and sold necessarily depleted at the time of such extraction and sale the property right of the original lessors in the Perkins mine 30 cents, depleted the property rights of the plaintiff therein 45 cents and depleted the property rights of
267 the plaintiff's lessees by the differences between 75 cents and the value in the mine of the ton so extracted and sold. It was in view of these facts that the court below found that the market value as of March 1, 1913, of the plaintiff's property rights and interests in these mines was depleted to the amount of $55,726.80 (representing an overpayment of tax in the sum of $17,128.44) by the extraction and sale of the ore from which the plaintiff derived its income in the year 1917.

This conclusion of the court below is assigned as error and the provisions of the statutes which condition the decision of the issue thus presented are found in the act of September 8, 1916 (39 Statutes 756, 758, 759), which prescribe the deductions permitted from the gross amount of the plaintiff's income for the year 1917 in order to ascertain its net taxable income for that year and those provisions are these:

"For the purpose of ascertaining the gain derived from the sale or other disposition of property, real personal, or mixed, acquired before March 1, 1913, the fair market price or value of such property as of March 1, 1913, shall be the basis for determining the amount of such gain derived." (Section 2 (c); section 10; page 766.)

"Section 10. That there shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation, joint-stock company or association, or insurance company, organized in the United States, no matter how created or organized, but not including partnerships, a tax of two per centum upon such income: * * *" (page 765.)

"Section 12 (a). In the case of a corporation, joint-stock company or association, or insurance company, organized in the United States, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources:

"First. All the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, * * *

"Second. All losses actually sustained and charged off within the year and not compensated by insurance or otherwise, including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade;
268 (a) in the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; (b) in the case of mines, a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made, such reasonable allowance to be made in the case of both (a) and (b) under rules and regulations to be prescribed by the Secretary of the Treasury:

"Provided, that when the allowance authorized in (a) and (b) shall equal the capital originally invested, or in case of purchase made prior to March first, 1913, the fair market value as of that date, no further allowance shall be made."

Counsel for the defendant concede that an allowance to the original lessors, the owners of the fee title to the mines, on account of the depletion of the market value as of March 1, 1913, of their property rights and interests therein caused by the extraction of the ores therefrom in 1917, is expressly granted to them by Section 12 of the Act of 1916. But they deny that the allowance of any depletion whatever on account of the reduction by such extraction and sale of ore of the market value as of March 1, 1913, of the property rights and interests of the plaintiff, or its lessees, therein on March 1, 1913, is authorized by that act.

But that act (section 10) requires every corporation organized in the United States to compute and pay its net income and excess profits taxes and, without any restriction or limitation to corporations that own the fee titles to mines, or to lessors thereof, or to any other class of mining corporations (section 12–second–b), it expressly authorizes "in the case of mines, a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made."

When one first reads this provision no doubt or uncertainty as to the parties to whom it authorizes these allowances for depletion to be made occurs to the ordinary mind. The suggestion does not arise that this is a grant to the owners of the fee titles to mines alone, or that lessees and all others having property interests in them are excepted from the grant. It requires the careful search
269 and study of an acute and ingenious intellect to find and persistently assert that position. The plain, clear, and reasonable meaning of the statute seems to be that the reasonable allowance for depletion in case of a mine is to be made to every one whose property right and interest therein has been depleted by the extraction and disposition "of the product thereof which has been mined and sold during the year for which the return and computation are

made." And the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover. (United States v. Deans, 230 Fed. 957, 961; Imperial Fire Insurance Company v. Coos County, 151 U. S. 452, 463; U. S. v. Ninety-nine Diamonds, 139 Fed. 961, 965; Stevens v. Nave-McCord Mercantile Co., 150 Fed. 71, 75; Standard Life & Accident Ins. Co. v. M'Nulty, 157 Fed. 224, 226; Delaware Ins. Co. v. Greer, 120 Fed. 916, 921.)

Another established rule for the interpretation of statutes is that when the legislative body has made a general grant and made no exception of any class of persons or corporations within its general terms, that fact raises a conclusive legal presumption that it intended to make no such exception and inhibits the courts from making such an exception by judicial legislation. (Cella Commission Company, v. Bohlinger, 147 Fed. 419, 425; Chauncey v. Dyke Bros., 119 Fed. 1, 15; Wrightman v. Boone County, 88 Fed. 435, 436; Union Central Life Ins. Co. v. Champlin, 116 Fed. 858, 860; United States v. Alamogordo Lumber Co., 202 Fed. 700, 706; Brun v. Mann, 151 Fed. 145, 157; Ayres v. Cone, 138 Fed. 778, 786.)

There were two classes of corporations interested in mines: the owners of the fee titles to them, or the lessors thereof, and the lessees thereof. The congressional grant of allowances for depletion in case of mines, by its general terms, included both classes and excepted neither from its benefits and it is not the province of the courts to exclude either of them therefrom. The grant of the reasonable allowances for depletion in case of mines is as broad and general as the requirement that in cases of mines every corporation interested therein shall compute and pay its income and excess profits taxes.

It is common knowledge that in the case of mines the property rights and interests therein and the incomes derived there-
270 from by lessees and others than those who own the titles to the mines, are much more valuable than the rights and interests of such owners, and it is difficult to believe that if Congress had intended by this grant of reasonable allowances for depletion to restrict it to the owners of the titles to mines, or to except from its benefits lessees and others owning all other property rights and interests therein, it would not have clearly expressed that intention by a restriction or by exceptions inserted in the act. The legal presumption is strong, it seems conclusive, that Congress never made and that it never intended to make any such limitation or exception.

In opposition to these considerations counsel invoke the fact that the Treasury Department in 1917 issued a document known as Form A-M-MS entitled, "Schedule for depletion, 1909 to 1917," in which it declared that under none of the acts of 1909, 1913 or 1916 was a lessee entitled to deduction from income on account of depletion and that, where a mine was leased before March 1, 1913, the allowance for depletion in favor of the lessor is not based on

e fair market value of the ore in place as of March 1, 1913, but the lessor's interest therein on that date. Under this rule in the se at hand the lessors, who had a property interest in the ore in ace in this mine in 1917 to the extent of 30 cents per ton in the rkins mine, received a reasonable allowance for depletion of their operty while the plaintiff, who had a property interest in that ne to the extent of 45 cents per ton therein, received no allowce for depletion. Counsel cites us to no opinion or decision of any the officers of the Treasury Department which presents any and reason for this rule or for its discrimination against lessees. d by Treasury decision No. 3386, under date of August 22, 1922, at department abandoned that rule and placed lessees on the ne plane as lessors in the case of oil and gas leases, which, under tion 12 of the act of 1916, are placed on the same plane as leases the case of mines, declared that in the case of a lessee the capital be returned "is the fair market value of the lessee's interest as March 1, 1913," and that "the value of the equities of lessor and see shall be computed separately, but when determined of the ne basic date shall together never exceed the value at that date the property in fee simple." Prior to this decision the regulations ovided that a lessee of oil and gas wells was entitled to no allowce for depletion, while under this latter decision he receives a reasonable allowance in proportion to the value of his property right and interest in the wells. This decision of August 22, 1922, is in accord with the decree below and seems equitle and lawful.

Counsel argue that no allowance for depletion should be made the plaintiff of account of the extraction and sale of ores from e mines in 1917, because it received no account thereof the royies of 45 cents per ton from the Perkins mine and 30 cents per from the Hudson mine, pursuant to the plaintiff's leases thereof. t on March 1, 1913, the plaintiff owned the property right and erest in these mines to collect and receive these royalties and ngress expressly granted to the plaintiff the right and privilege a reasonable allowance in the ascertainment and computation its net income and excess profits taxes for the depletion of the rket value as of March 1, 1913, of that property right and interby the extraction and sale of the ore in the mine during the year 7, for which the return and computation in this case was made. Moreover, counsel's argument here is equally cogent to sustain conclusion that the fee owners and original lessors, who received ir 30 cents per ton royalties on account of the extraction of the s in 1917, were entitled to no allowance for depletion, a position ich counsel themselves admit is unsound.

Another contention of counsel is that it was error to grant the see any allowance for depletion because such allowance results in anting the same allowance for depletion twice, once to the lessor d once to the lessee; but no such allowance has ever been made this case and no such allowance is claimed. The court below

limited the plaintiff's allowance to the depletion of the market value as of March 1, 1913, of its individual right and interest in the mines and the ore in them, and no claim by anyone has been made for the same allowance.

Counsel cite and seem to rely upon the opinion of the Circuit Court of Appeals of the Sixth Circuit in Weiss v. Mohawk Mining Company, (264 Fed. 502), in which that court held that the lessee in that mining case was not entitled to a reasonable allowance for depletion of the value of its property right in the royalties to accrue to it under the leases of the mine. The opinion in the Weiss case has been carefully read and studied, but, after careful consideration, notwithstanding our great respect for and deference to the judges who concurred in that opinion, it has not proved persuasive.

272 The question in the Weiss case was, and the question in this case is, whether the grant of section 12–second–(b) of the act of 1916, in the case of mines, of a reasonable allowance for depletion is to lessors, lessees, and others who owned valuable rights and interests in mines on March 1, 1913, in proportion to their respective interests, or is limited and restricted to lessors who were owners of the fee titles to the mines. In the Weiss case the court held that the grant was restricted to lessors who were fee owners of the mines alone and that it excluded lessees from all benefits thereunder.

The court based this conclusion, first, on the proposition that the question here under consideration had been conclusively determined by the decision of the Supreme Court in United States v. Biwabik Mining Company in 247 U. S. 116, and, second, upon the position that the same allowance for depletion could not be lawfully twice made, once to the lessor and once to the lessee. The second proposition is not in issue in the case in hand. The allowance in this case has been sedulously limited to the market value as of March 1, 1913, of the individual property right and interest of the plaintiff in the two mines.

After mentioning the arguments of counsel in support of the view that the grant of the allowance for depletion was not limited to lessors or fee owners of mines, the court in the Weiss case (264 Fed. 504, 505) said:

"These contentions would deserve serious consideration if the questions involved were open but we can not think that they are. We can not conceive any substantial distinction as applied to a mine between that depreciation or allowance for capital assets consumed which was sought by mine owners under the earlier acts and that depletion which was expressly allowed by the amendment of 1916. From every point of view, this kind of depreciation or allowance was depletion, and this allowed depletion is depreciation or diminution of capital, and when the question of right to the allowance arises as between fee owner and lessee it can make no difference whether the claimed allowance is called by one name or by the other. (United States v. Biwabik Mining Company, 247 U. S. 116.)"

But if there were no substantial distinction as applied to a mine between that depreciation or allowance for capital assets consumed which was sought by mine owners under the earlier acts, and
273 that depletion which was expressly allowed by the act of 1916, there remains, nevertheless, this distinction and difference between the right to the allowance sought under the earlier acts and the right to the allowance sought in this case and in the Weiss case. Under the earlier acts the right to the allowance sought was not expressly granted by Congress; under the act of 1916, the right to the allowance sought is expressly granted. The difference is great.

Moreover, was the "depreciation" of the act of 1909 and other acts prior to 1916 the same thing as the depletion granted in the latter act? And did the Supreme Court decide the instant question in United States v. Biwabik Mining Company, a case which did not arise under the act of 1916 but arose under the act of 1909?

The act of August 5, 1909 (36 Statutes 113, section 38), provided for deductions from gross incomes among other things of:

"Second: * * * All losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, * * * "

In Von Baumback v. Sargent Land Company (242 U. S. 503), which arose under the act of 1909, the Sargent company, which was the fee owner and lessor of a mine, sought a reduction of its taxable income on account of the depreciation of its mine by the extraction and sale of ore from which it received royalties. But the Supreme Court in 242 U. S. 524 and 525 said:

"The statute permits deduction of 'all losses actually sustained within the year * * * including a reasonable allowance for depreciation of property.' What was here meant by 'depreciation of property'? We think Congress used the expression in its ordinary and usual sense as understood by business men. It is common knowledge that business concerns usually keep a depreciation account, in which is charged off the annual losses for wear and tear and obsolescence of structures, machinery, and personality in use in the business. We do not think Congress intended to cover the necessary depreciation of a mine by exhaustion of the ores in determining the income to be assessed under the statute by including such exhaustion within the allowance made for depreciation. It would be a strained use of the term 'depreciation' to say that, where ore is taken from a mine in the operation of the property, depreciation, as gener-
274 ally understood in business circles, follows. True, the value of the mine is lessened from the partial exhaustion of the property, and, owing to its peculiar character, can not be replaced. But in no accurate sense can such exhaustion of the body of the ore be deemed depreciation. It is equally true that there seems to be a hardship in taxing such receipts as income, without some deduction arising from the fact that the mining property is being continually reduced by the removal of the minerals. But such consideration will

not justify this court in attributing to depreciation a sense which we do not believe Congress intended to give to it in the act of 1909.

"It may be admitted that a fair argument arises from equitable considerations that, owing to the nature of mining property, an allowance in assessing taxes upon income should be made for the removal of the ore deposits from time to time. Congress recognized this fact in passing the income tax section of the tariff act of 1913 (Sec. II, 38 Stat. at L. 166, 167, chap. 16, Comp. Stat. 1913, sections 6319–6322), when it permitted 'a reasonable allowance for the exhaustion, wear, and tear of property arising out of its use or employment in the business, not to exceed, in the case of mines, five per centum of the gross value at the mine of the output for the year for which the computation is made'; and in the income tax law of September 8, 1916, a reasonable allowance is made in the cases of mines for depletion thereof 'not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made.' These provisions were not in the act of 1909, and, as we have said, we think that Congress, in that act, used the term 'depreciation' in its ordinary and usual significance. We therefore reach the conclusion that no allowance can be made of the character contended for as an item of depreciation."

So it was that when the Weiss case was decided the Supreme Court had expressly adjudged that the "depreciation" of the act of 1909 and other acts was neither the depletion nor the equivalent of the depletion of the act of 1916 nor of the exhaustion of the act of 1913, and the reasonable, if not the unavoidable deduction from the opinion in the Sargent company case, which has been quoted, is that if that case had arisen under the act of 1913, or under the act of September 8, 1916, that court would have sustained an allowance for depletion.

275 In the case of United States v. Biwabik Mining Company (247 U. S. 116), which arose under the act of 1909, a lessee of a mine made a like claim for an allowance for the depreciation of its property to that claim which the lessor in the Sargent Land Company case had made, and the Supreme Court disallowed its claim on the same ground that it had disallowed that of the lessor in the latter case.

Neither of these cases arose under the act of 1916; in neither of them, nor in any other decision of the Supreme Court cited to which the attention of this court has been called, did the Supreme Court hold that the depreciation of property specified in some of the earlier acts of Congress was the equivalent of the depletion of it, on account of which the reasonable allowance is expressly granted by the act of 1916. Moreover, in the Sargent Land Company case the Supreme Court, as we have seen, expressly held that such depreciation for which allowance was granted in the act of 1909 was not the equivalent of the depletion for which the allowance was granted in the act of 1916. Neither in the Sargent Land Company case nor in the

Biwabik Mining Company case did the Supreme Court hold that he grant of any of these allowances in mining cases was restricted o lessors or to the fee owners of the mines alone, nor did it make ny discrimination between lessors and lessees. On the other hand, n the Sargent Land Company case and the Biwabik case it treated he lessor and the lessee exactly alike.

Upon consideration of the foregoing opinions and decisions of the Supreme Court, we are unable to resist the conclusion that they do ot conclusively or inferentially adjudge or intimate that the grant f section 12–second–(b) of the act of 1916 to corporations, in he case of mines, of a reasonable allowance for depletion, is limited o lessors who are fee owners of the mines alone and that it grants o such allowance to lessees of mines or to other corporations own- ng property interests therein. On the other hand, in view of those ecisions and opinions and in view of the plain terms of the grant, ithout limitation or exception, our opinion is that—

It was the purpose, intent, and object of Congress by the enact- ent of section 12–second–(b) of the act of September 8, 1916, 9 Statutes 759, in the case of mines, to grant to fee owner, lessor, ssee, and other corporations who were on March 1, 1913, the own- rs of valuable property rights and interests in mines, in reduction of their respective gross incomes to ascertain their net taxable 76 incomes, a reasonable allowance for the depletion of their property interests in the mines and in the ores therein by the xtraction and sale of the ores in the respective years for which the omputations and returns of their incomes should be made, not ex- eeding, in the aggregate, the market value of those property inter- sts on March 1, 1913.

The terms of the statute clearly express and carry into effect this tent, purpose, and object.

The true construction and legal effect of this statute is to grant lessee and other corporations which owned valuable property terests in mines on March 1, 1913, reasonable allowances for de- letion of those interests in proportion to the amounts and values the interests and of the depletion to the same extent that it made ch grant to lessor corporations who were the fee owners of the ines.

The plaintiff was entitled to the allowance for depletion on which s judgment in this case is founded, and that judgment is affirmed.

7 In United States Circuit Court of Appeals

[Title omitted.]

Judgment

Filed November 12, 1923

This cause came on to be heard on the transcript of the record from e District Court of the United States for the District of Minnesota, d was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Alworth-Stephens Company have and recover against Margaret C. Lynch, executrix of the last will and testament of E. J. Lynch, deceased, substituted as defendant in the place of said E. J. Lynch as collector of internal revenue for the district of Minnesota, the sum of twenty-six and no/100 dollars for its costs in this behalf expended, and that the same be collected according to law.

NOVEMBER 12, 1923.

278 United States Circuit Court of Appeals

Clerk's certificate

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Minnesota, and exhibis pursuant to stipulation of parties, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Margaret C. Lynch, executrix of the last will and testament of E. J. Lynch, deceased, etc., was plaintiff in error and the Alworth-Stephens Company was defendant in error, No. 6219, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the sixteenth day of January, A. D. 1924, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the judges of the District Court of the United States for the District of Minnesota.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this twenty-third day of January, A. D. 1924.

[SEAL.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

279 Supreme Court of the United States

No. 784, October term, 1923

MARGARET C. LYNCH, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF E. J. LYNCH, DECEASED, PETITIONER
vs.
ALWORTH-STEPHENS COMPANY

Order allowing petition for writ of certiorari

Filed March 3, 1924

On petition for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Eighth Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

MARCH 3, 1924.

280 In the Supreme Court of the United States

October Term, 1924

MARGARET C. LYNCH, EXECUTRIX OF THE LAST WILL AND testament and of the estate of E. J. Lynch, deceased, substituted as defendant in place of said E. J. Lynch as collector of internal revenue for the district of Minnesota, deceased, plaintiff in error
v.
ALWORTH-STEPHENS COMPANY, DEFENDANT IN ERROR } No. 273

Stipulation as to parts of record to be printed

It is hereby stipulated and agreed by and between the parties to the above entitled action that as a part of the record upon which said action may be heard and determined in the Supreme Court of the United States, the clerk of said court may make a part of the record upon said appeal the following exhibits:

From Plaintiff's Ex. 1: Exhibit K, attached thereto.

Prints shown on pages 217, 219, 221 of record from U. S. Circuit Ct. of Appeals, being part of Plaintiff's Ex. 1.

Plaintiff's Exhibit 2.

Defendant's Exhibit AA.

But the said exhibits need not be made a part of the printed transcript of the record and either or any party may refer to the certified copy of the record containing the above exhibits now on file

in the clerk's office, and they shall be considered a part of the record before this court on the hearing upon the appeal.

JAMES M. BECK,
Solicitor General.
J. L. WASHBURN,
W. D. BAILEY,
OSCAR MITCHELL,
Attorneys for Defendant in Error.

[File endorsement omitted.]

In the Supreme Court of the United States.

MARGARET C. LYNCH, EXECUTRIX OF the Last Will and Testament of E. J. Lynch, Deceased, petitioner,
v.
ALWORTH-STEPHENS COMPANY, RESPONDENT.

No. ——.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

The Solicitor General, on behalf of Margaret C. Lynch as executrix of the last will and testament of E. J. Lynch, deceased, formerly Collector of Internal Revenue for the District of Minnesota, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit entered in the above case on November 12, 1923, affirming the judgment of the District Court for the District of Minnesota.

STATEMENT OF THE CASE.

This is an action instituted by the Alworth-Stephens Company, a mining corporation, against E. J. Lynch as Collector of Internal Revenue for the District of Minnesota to recover back the sum of $21,045.91, Federal income and excess-profits taxes paid for the

year 1917, assessed and collected under the provisions of the Revenue Act of 1916, as amended by the Revenue Act of 1917. The District Court for the District of Minnesota gave judgment for the plaintiff in the sum of $20,322.89, and on appeal to the Circuit Court of Appeals for the Eighth Circuit the judgment was affirmed. The Collector of Internal Revenue, E. J. Lynch, having died subsequently to the trial of the case in the District Court, Margaret C. Lynch as executrix was substituted as plaintiff in error in the Circuit Court of Appeals.

During the year 1917 the plaintiff held leases of two mines—namely, the Perkins Mine and the Hudson Mine—in accordance with the terms hereinafter stated.

It had a lease of the Perkins mine, with the right to explore for and remove iron ore for 50 years, made in 1908, by the terms of which it was under an obligation to pay to the lessor, the owner of the mine, 30 cents for each ton of ore taken from the mine. It subleased these rights in 1908 to one Lutes, who agreed to pay 75 cents per ton for every ton taken from the mine, and the mine was operated in 1917 by an assignee of Lutes under the lease to him, so that the plaintiff received 45 cents per ton of the ore extracted during that year. It had a lease for 50 years of the Hudson mine, with the right to explore for and remove iron ore, made by the fee owners thereof in 1909, under which it was required to pay to the lessors 30 cents per ton for the ore taken from the mine. In 1909 it subleased these rights to the

Syracuse Mining Company, which agreed by the terms of the lease to pay to it 60 cents per ton for every ton taken from the mine, and this mine was operated under this lease in 1917.

The plaintiff's entire income for 1917 was derived from the rents and royalties received from the subleases of the Perkins and Hudson mines. The plaintiff instituted the present action to recover back the sum of $21,045.91, claiming that it was entitled, under the provisions of the statutes quoted below, to a deduction for depletion of its ore properties as representing a return of capital assets, and to classification as a corporation having no invested capital or not more than nominal capital.

The District Court found that the plaintiff had an invested capital on January 1, 1917, of the sum of $25,000, and held that such amount was more than a nominal capital and that the plaintiff was taxable under Section 201 of the Revenue Act of 1917; this was affirmed by the Circuit Court of Appeals.

The District Court, however, held that under the provisions of the statutes quoted below the plaintiff was entitled to deduct from its total net royalties received during 1917 the market value on March 1, 1913 (which it found to be 71.9 per cent of the total of the receipts), of the plaintiff's property interest in the ore in the mines which was extracted during 1917.

The respondent maintains and contends that it is entitled as lessee of the mines to a deduction for depletion in figuring its net taxable income for the year 1917.

The petitioner, however, contends that under the provisions of the statutes quoted below this right to a deduction for depletion is restricted to the lessors who were owners in fee of the mines to the exclusion of the lessees.

QUESTION.

Is the lessee of mining property entitled to deduct from gross income an allowance for "depletion" under the provisions of the Revenue Act of 1916?

STATUTES INVOLVED.

REVENUE ACT OF 1916.[1]

(Act of September 8, 1916, 39 Stat. 756, 765–770.)

> SEC. 10. That there shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation, joint-stock company or association, or insurance company, organized in the United States, no matter how created or organized, but not including partnerships, a tax of two per centum upon such income; * * *.
>
> SEC. 12(*a*). In the case of a corporation, joint-stock company, or association, or insurance company, organized in the United States, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources—
>
> First. All the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties; * * *.

[1] Section 4 of the Revenue Act of 1917 imposed a tax of 4 per cent in addition to that levied by Section 10 of the Revenue Act of 1916.

Second. All losses actually sustained and charged off within the year and not compensated by insurance or otherwise, including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade; (*a*) in the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow but by the settled production of regular flow; (*b*) in the case of mines a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made, such reasonable allowance to be made in the case of both (*a*) and (*b*) under rules and regulations to be prescribed by the Secretary of the Treasury. *Provided*, that when the allowance authorized in (*a*) and (*b*) shall equal the capital originally invested, or in case of purchase made prior to March first, nineteen hundred and thirteen, the fair market value as of that date, no further allowance shall be made; * * *.

Third. The amount of interest paid within the year; * * *.

Fourth. Taxes paid within the year * * *.

REVENUE ACT OF 1917.

(Act of October 3, 1917, 40 Stat. 300, 302–307.)

Sec. 201. That in addition to the taxes under existing law and under this act there shall be levied, assessed, collected, and paid

for each taxable year upon the income of every corporation, partnership, or individual, a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the net income: (here follow the percentages) * * *.

Sec. 203. That for the purposes of this title the deduction shall be as follows, except as otherwise in this title provided—

(a) In the case of a domestic corporation, the sum of (1) an amount equal to the same percentage of the invested capital for the taxable year which the average amount of the annual net income of the trade or business during the prewar period was of the invested capital for the prewar period (but not less than seven or more than nine per centum of the invested capital for the taxable year), and (2) $3,000; * * *.

REASONS FOR GRANTING THE PETITION.

1. The construction of Section 12(*a*) of the Revenue Act of 1916, allowing a deduction in the case of mines of "a reasonable allowance for depletion" has never been directly passed upon by this court, but in the case of *Weiss, Collector*, v. *Mohawk Mining Company*, 264 Fed. 502, the Circuit Court of Appeals for the Sixth Circuit held that a lessee of mining property was not entitled to any allowance for depletion under the provisions of the Revenue Act of 1916, and this court denied a petition for certiorari, 254 U. S. 637.

2. The Circuit Court of Appeals for the Eighth Circuit in the case at bar has refused to follow the rule laid down in the *Mohawk Mining case, supra*, and the opinions of the two courts are in direct conflict. The opinion of the Circuit Court of Appeals for the Eighth Circuit states:

> Counsel cite and seem to rely upon the opinion of the Circuit Court of Appeals of the Sixth Circuit in *Weiss* v. *Mohawk Mining Company*, 264 Fed. 502, in which that court held that the lessee in that mining case was not entitled to a reasonable allowance for depletion of the value of its property right in the royalties to accrue to it under the leases of the mine. The opinion in the *Weiss case* has been carefully read and studied, but, after careful consideration, notwithstanding our great respect for and deference to the judges who concurred in that opinion, it has not proved persuasive.

3. In auditing thousands of returns of mining companies under the provisions of the Revenue Act of 1916 the Department has followed the decision in the *Mohawk Mining case* and has allowed depletion only to the fee owner of mineral lands, and no depletion to a lessee. If the rule laid down in the Eighth Circuit is sustained, refunds of approximately ten million dollars will necessarily be made to lessees.

4. If the rule established by the District Court and affirmed by the Circuit Court of Appeals for the Eighth Circuit that no income or profit on ore removed is realized until the capital value is returned

represents the correct rule, then the amount of refunds of taxes paid by lessees would amount to an additional ten million dollars. And if the same rule is also applied to lessors under the decision of the Circuit Court of Appeals for the Eighth Circuit, then there will be an additional refund of seven million dollars.

5. In holding that the lessee of mining property is entitled to depletion under the provisions of the Revenue Act of 1916, the Circuit Court of Appeals for the Eighth Circuit has utterly disregarded and refused to follow the fundamental principles announced by this court in the cases of *Stratton's Independence* v. *Howbert*, 231 U. S. 399; *Stanton* v. *Baltic Mining Company*, 240 U. S. 103; *Von Baumbach* v. *Sargent Land Company*, 242 U. S. 503; *United States* v. *Biwabik Mining Company*, 247 U. S. 116; *Goldfield Consolidated Mines Co.* v. *Scott*, 247 U. S. 126; *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179.

Therefore, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Eighth Circuit should be granted.

JAMES M. BECK,
Solicitor General.

BRIEF IN SUPPORT OF PETITION.

The decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Weiss* v. *Mohawk Mining Company*, 264 Fed. 502, and the decision of the Circuit Court of Appeals for the Eighth Circuit in the case at bar are diametrically opposed and cannot be reconciled. Which rule is to be followed can only be finally determined by this court.

The long prevailing rule and principle announced by this court, which the Circuit Court of Appeals for the Sixth Circuit followed in the case of *Weiss* v. *Mohawk Mining Company*, is that the entire proceeds derived from mining operations constitute income and profit without deduction for original cost or capital invested. The income derived from mining operations is distinguished by peculiar principles and by special rules which have been recognized for a long period of years by both the courts and legislative bodies. These rules and principles are founded upon the distinctive character of mining properties and their particular method of operation.

These principles have been recognized by this court in many cases, particularly *Stratton's Independence* v. *Howbert*, 231 U. S. 399, at page 413.

This court has held that there is no inherent right to a deduction for depletion.

Goldfield Consolidated Mines Co. v. *Scott*, 247 U. S. 126.

Stanton v. *Baltic Mining Co.*, 240 U. S. 103.

Von Baumbach v. *Sargent Land Co.*, 242 U. S. 503.

Depletion as used in the Revenue Act of 1916 means an exhaustion of capital assets, and any such exhaustion constitutes a loss to the fee owner of the property, not to a lessee. The lessee loses nothing. A lessee bargains with the fee owner to mine out the mineral content of the land. The land of the fee owner is thereby depleted, but no depletion is suffered by the lessee as such. His income is represented by the proceeds of the sale of ore less expenses incurred. His object is to exhaust the ore, and the exercise of this privilege is all that he pays for. If, as in the case at bar, the lessee transfers all of his rights under lease to an operating company, he transfers his privilege in consideration of the payment of royalties. He transfers only the right which he held as lessee. The amount received as royalties represents his income. The operating company exhausts the ore, and the land of the fee owner alone is depleted by the amount of ore extracted and removed.

It has been repeatedly held by this court, and the rule definitely established, that leases upon ore lands in Minnesota are not conveyances of the ore in place but are simply grants with the privilege to explore for, mine, and remove the minerals from the land.

Stratton's Independence v. *Howbert*, 231 U. S. 399.

Stanton v. *Baltic Mining Co.*, 240 U. S. 103.

Von Baumbach v. *Sargent Land Co.*, 242 U. S. 503.

United States v. *Biwabik Mining Co.*, 247 U. S. 116.

Goldfield Consolidated Mines Co. v. *Scott*, 247 U. S. 126.

Doyle v. *Mitchell Bros. Co.*, 247 U. S. 179.

Weiss v. *Mohawk Mining Co.*, 264 Fed. 502.

In the case of *United States* v. *Biwabik Mining Company*, 247 U. S. 116, it was held that the lease involved was not to be construed as the conveyance of the ore in place, although the latter could be measured with substantial accuracy. The court says at page 125:

> The lessee takes from the property the ore mined, paying for the privilege so much per ton for each ton removed. He has this right or privilege under the form of lease here involved so long as he sees fit to hold the same without exercising the privilege of cancellation therein contained. He is, as we held in the *Sargent Land Co. Case*, in no legal sense a purchaser of ore in place.

In the case of *Weiss, Collector*, v. *Mohawk Mining Company*, 264 Fed. 502, it was held the Mohawk Mining Company because it was a lessee only was not entitled to the allowance which it was admitted would be rightful if it were the fee owner. The court at page 505 uses the following language:

> In *United States* v. *Biwabik Co.*, 247 U. S. 116 (arising under the act of 1909), it was ruled, after full consideration, that under a lease, practically identical with the Mohawk lease now involved, the nature of the interest

> held by the lessee was not such as to permit it to claim the allowance, but that the contingencies which attended the character of the lessee's interest barred it from claiming that its capital assets had been diminished. It is true that the question whether the mining of ore could be considered depreciation in any event was underlying, and that this question has been completely removed by the amendment of 1916; but the Supreme Court did not rest its conclusion at all upon the definition of depreciation.

The court further states that it can conceive no substantial distinction as applied to a mine between the depreciation as sought by mine owners under the earlier act and that depletion which was expressly allowed by the amendment of 1916. On petition for rehearing the court says, at page 506:

> We cannot read the decisions of the Supreme Court as having determined that the exhaustion of ore reserve is so inherently a business loss, rather than an impairment of capital, that a statutory grant of the right to deduct for depletion on that account will reach a case which has been adjudged not to involve the diminution of capital assets.

A petition for a writ of certiorari in the *Mohawk Company case* was denied. (254 U. S. 637.)

This court has approved and applied under the terms of the Revenue Act of 1916, Section 12 (*a*), which governs both the *Mohawk Company case* and the instant case, the same rule regarding the claim of

a lessee of mines for a deduction on account of impairment of capital assets which it had previously applied under earlier revenue acts.

The Department has consistently followed the rules laid down by this court and by the Circuit Court of Appeals for the Sixth Circuit in the case of *Weiss* v. *Mohawk Mining Co.*, *supra*, and thousands of cases of mining companies have been settled and taxes paid under the rule of the Sixth Circuit. The decision of the Circuit Court of Appeals for the Eighth Circuit in the case at bar disregards the principles heretofore laid down by this court and refuses to follow the rule laid down by the Sixth Circuit. The Eighth Circuit holds, first, 'that the Revenue Act of 1916 grants to the lessor, the lessee, and the fee owner, and to other corporations who were on March 1, 1913, the owners of valuable property rights and interest in mines, a reasonable allowance for depletion, and, second, holds that no net income is received by a lessee or lessor until the capital value as of March 1, 1913, has been repaid.

If the rule now announced by the Circuit Court of Appeals for the Eighth Circuit is correct, then the principles laid down by this court in many adjudicated cases are fundamentally wrong. If this court accepts the rule of the Eighth Circuit it must necessarily overrule its prior adjudication.

It is respectfully submitted that the rule in the Sixth Circuit, which follows the prior cases decided by this court, is correct, that the decision in the

Eighth Circuit is erroneous, and that the petition for certiorari should be granted to finally establish the rule to be followed.

JAMES M. BECK,
Solicitor General.

FEBRUARY, 1924.

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In the Supreme Court of the United States

OCTOBER TERM, 1924

MARGARET C. LYNCH, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF E. J. LYNCH, DECEASED, ETC., PETITIONER
v.
ALWORTH-STEPHENS COMPANY
No. 273

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

STATEMENT OF THE CASE

On March 9, 1920, the Alworth-Stephens Company, a corporation, instituted suit by filing a complaint in the District Court of the United States for the District of Minnesota against E. J. Lynch as Collector of Internal Revenue for the District of Minnesota to recover the sum of $21,045.91 income and excess profits taxes paid for the year 1917.

On August 25, 1920, E. J. Lynch, as Collector of Internal Revenue for the aforesaid district, filed his answer. The case was tried by the Court without

a jury, and judgment was rendered for respondent for the sum of $20,322.89, with costs. (*Alworth-Stephens Co.* v. *Lynch*, 278 Fed. 959.)

Upon writ of error the Circuit Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court. (294 Fed. 190.)

THE FACTS

In the year 1907 Henry Stephens and Albert L. Stephens, and their wives, by an option contract gave Marshal H. Alworth, of Duluth, Minnesota, for a period of ten years the exclusive right to explore for iron ore on 8,000 acres of land located on the Mesaba Range in the State of Minnesota, with the right to demand from them (they being fee owners) leases upon tracts of land to be thereafter selected from the land covered by the option contract.

The respondent was incorporated under the laws of the State of Minnesota in September, 1907, with an authorized capital of $100,000.00. Up to and including the year 1917 there had been issued, and was outstanding only $25,000.00 of its capital stock. Immediately after its organization it became the assignee from Mr. Alworth of the contract heretofore referred to and began exploring for ore. On August 25, 1908, the respondent having discovered ore, demanded and received from the fee owners, as provided in said option contract, a lease for fifty years on what subsequently became known as the Perkins and Silverton mines. This lease provided that the fee owners were to receive thirty cents per ton royalty on all iron ore mined,

with a guaranteed payment based upon fifty thousand tons per year, which was considered and designated as "ground rent."

The respondent on September 1, 1908, subleased these lands to John S. Lutes on an agreement of lease providing for a royalty of seventy-five cents per ton, an increase of forty-five cents per ton above that provided in the original lease, and as a further consideration the payment of $17,868.50 as a bonus. This lease was subsequently assigned by Mr. Lutes to the Perkins Mining Company, which thereafter operated the property until this ore was exhausted in September, 1919.

On July 1, 1908, the respondent, by an option contract, gave H. G. Dalton the right to explore for iron ore and take mining leases upon certain other tracts of land covered by the original option to the defendant in error. This option was thereafter assigned by Mr. Dalton to the Syracuse Mining Company, which, after exploring, discovered a body of ore, which became known as the "Hudson" mine. The respondent then demanded and received from the fee owners a lease, of the same terms and conditions as heretofore given, on this "Hudson" property, which was executed March 12, 1909. Thereupon the respondent executed to the Syracuse Mining Company a sublease on said Hudson property. The royalty provided in this sublease to be paid to the respondent was sixty cents per ton, being thirty cents above that provided in the original lease

to the respondent. The terms of the leases and subleases are practically identical. They provide in substance that the lessors "do hereby let, lease and demise unto the lessees * * * for a term of * * * years the property hereinafter described, * * * for the purpose of exploring for, mining, taking out and removing therefrom the merchantable iron ore * * *." They have the usual covenants allowing the lessees at any time upon giving notice to terminate the leases in so far as they are required to mine ore or pay royalties therefor. In consideration of the lessors' covenants, the lessees agreed to "on or before the tenth day of January, April, July, and October in each calendar year covered by this lease, or for the period of time for which this contract and lease continue in force, pay to the lessors for all iron ore which shall be mined and removed from said lands during the three calendar months next preceding the first day of the month in which payment is to be made as aforesaid, a royalty of * * * cents per ton for all iron ore so taken out, mined and carried away from said lands and premises * * *" and the lessees further agree that they "will mine and remove from said lands * * * at least fifty thousand tons annually * * *" or that they "will pay to the lessors an advance royalty which shall be treated and considered as ground rent of * * * cents per ton on said minimum quantity each year, the same as if actually mined and removed." The

leases and subleases also contain the usual covenants for forfeiture in the event the covenants are not performed on the part of the lessees.

Respondent's entire income for 1917 was derived from the rents and royalties received from these two subleases, i. e., from the subleases on the Perkins and Hudson mines.

For the year 1917 the respondent filed an income-tax return under Section 10 of the Revenue Act of 1916 showing a taxable net income of $77,605.98 and excess-profits tax return under Section 209 of the Revenue Act of 1917 based upon 8 per cent of its net income, less a deduction of $3,000.

On June 10, 1918, the respondent paid a total tax of $10,253.21, of which $4,292.74 was paid as income tax and $3,960.47 was paid as excess-profits tax.

The excess-profits tax return showed on its face that the respondent had a paid-in capital at the close of the year 1916 of $25,000. On a reaudit of the return by the Commissioner of Internal Revenue the respondent was assessed an additional excess-profits tax under Section 210 of the Revenue Act of 1917 in the sum of $17,128.44.

The respondent paid this additional tax and thereafter in April, 1919, filed a claim for refund for the sum of $25,737.58, claiming that its invested capital as of January 1, 1917, was at least $124,444.88 instead of $25,000, as shown by the original return. This claim for refund was rejected by the Commissioner of Internal Revenue and the respondent held to be

properly assessable under Section 210 of the Revenue Act of 1917. Thereafter, and on March 9, 1920, the respondent instituted the present action to recover back the sum of $21,045.91 based upon a restatement and recomputation of its tax liability in which it claimed to be entitled under the income-tax act to a deduction for depletion of its ore properties as representing a return of capital assets and for the purpose of the excess-profits act to be classified as a corporation having no invested capital or not more than a nominal capital.

The District Court in its findings of fact found that the respondent had an invested capital on January 1, 1917, of the sum of $25,000.00, and held that such an amount was not a nominal capital and that the respondent was taxable under Section 201 of the Revenue Act of 1917. The Court also held under the provisions of Section 12 (a) of the Revenue Act of 1916 that the respondent was entitled to deduct from its total net royalties received during 1917 the market value on March 1, 1913 (which it found to be 71.9% of the total net receipts) of the respondent's property interest in the ore in the mines which was extracted during 1917. The decision of the District Court was affirmed by the Circuit Court of Appeals.

THE STATUTES

Revenue Act of 1916 (Act of September 8, 1916, 39 Stat. 756, 765–770):

> SEC. 10. That there shall be levied, assessed, collected, and paid annually upon the total

net income received in the preceding calendar year from all sources by every corporation, joint-stock company or association, or insurance company, organized in the United States, no matter how erected or organized, but not including partnerships, a tax of two per centum upon such income; * * *

SEC. 12 (a). In the case of a corporation, joint-stock company or association, or insurance company, organized in the United States, such net income shall be ascertained by deducting the gross amount of its income received within the year from all sources—

First. All the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties; * * *

Second. All losses actually sustained and charged off within the year and not compensated by insurance or otherwise, including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade; (a) in the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; (b) in the case of mines a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made, such reasonable allowance to be made in the case of both (a) and (b) under rules and regulations to

be prescribed by the Secretary of the Treasury. Provided, that when the allowance authorized in (a) and (b) shall equal the capital originally invested, or in the case of purchase made prior to March first, nineteen hundred and thirteen, the fair market value as of that date, no further allowance shall be made; * * *

Third. The amount of interest paid within the year; * * *

Fourth. Taxes paid within the year * * *.

Revenue Act of 1917 (Act of October 3, 1917, 40 Stat. 300, 301–307):

SEC. 201. That in addition to the taxes under existing law and under this act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corporation, partnership, or individual, a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the net income (here follow the percentages) * * *."

SEC. 203. That for the purpose of this title the deduction shall be as follows, except as otherwise in this title provided—

(a) In the case of a domestic corporation, the sum of (1) an amount equal to the same percentage of the invested capital for the taxable year which the average amount of the annual net income of the trade or business during the pre-war period was of the invested capital for the pre-war period (but not less than seven or more than nine per centum of the invested capital for the taxable year), and (2) $3,000.

NOTE.—Section 4 of the Revenue Act of 1917 imposed a tax of 4 per cent in addition to that levied by Section 10 of the Revenue Act of 1916.

Revenue Act of 1918 (Act of February 24, 1919, 40 Stat. 1057, 1078–1079):

> SEC. 234 (a) That in computing the net income of a corporation subject to the tax imposed by Section 230 there shall be allowed as deductions:
>
> * * * * *
>
> (9) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost, including cost of development not otherwise deducted: *Provided*, That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date: *Provided further*, That in the case of mines, oil and gas wells, discovered by the taxpayer, on or after March 1, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property at the date of the discovery, or within thirty days thereafter; such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee.

ISSUE

Is the respondent, who is a lessee of mining properties, entitled to deduct, as depletion, under the provisions of the revenue act of 1916, any value of the ore belonging to the fee owner of the mine, which was mined and removed during the year 1917?

ARGUMENT

The respondent, in computing its net taxable income for the year 1917, is not entitled to deduct, as depletion, any value of the ore, belonging to the fee owner of the mine, which was mined and removed during the year 1917.

This is a test case involving a construction of Section 12 of the Revenue Act of 1916, granting, in the case of mines, "a reasonable allowance for depletion" as a deduction from gross income. The particular question is whether this allowance can be claimed by a lessee of mining property under the provisions of the Act.

The Circuit Court of Appeals for the Sixth Circuit has held that a lessee is not entitled to the allowance. (*Weiss, Collector,* v. *Mohawk Mining Company,* 264 Fed. 502. Petition for certiorari denied, 254 U. S. 637.) In the case at bar the Circuit Court of Appeals for the Eighth Circuit refused to follow the rule laid down in the Mohawk Mining Company case. Thousands of income tax returns of mining companies have been audited and taxes collected on the basis of the decision in the *Mohawk Mining Company case.* If the decision of the Circuit Court of

Appeals for the Eighth Circuit in the case at bar is correct, approximately thirty millions of taxes collected must be refunded. A correct construction of the Statute is therefore fundamental and of the utmost importance.

(a) The leases were not conveyances to the defendant in error of the ore in place

The Supreme Court has repeatedly had before it Minnesota leases of iron properties and has repeatedly held that they are only contracts of rental which carry the right to use, occupy and mine the ore, but are not conveyances of the ore in place. The force of these rulings goes to the fact that the ore in the ground at all times remains the property of the fee owner and as extracted the property of the fee owner is depleted.

Replying upon the cases of *Stratton's Independence* v. *Howbert*, 231 U. S. 599, and *Stanton* v. *Baltie Mining Co.*, 240 U. S. 103, the Supreme Court in the case of *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, held that the Minnesota mining leases involved were not a sale of property and the monies paid by the lessees were not converted capital but rents or royalties, taxable as income under the provisions of the Corporation Excise Tax Act of 1909. The court says:

> All of the mining leases, hereinafter mentioned, with the exception of a contract with the Van Buren Mining Company, were executed before the organization of the corporations. Each of these instruments provided

that the owners of the property demised to the lessees, exclusively, all the land covered by the descriptions for the purpose of exploring for, mining and removing the merchantable iron ore which might be found therein for and during the period named, usually fifty years. The lessees were given exclusive right to occupy and control the demised premises and to erect all necessary buildings, structures and improvements thereon. Right was reserved to the lessors to enter for the purpose of measuring the amount of ore mined and removed and making observations of the operations in the mines. The lessees agreed to pay in most cases, twenty-five cents per ton for all ore mined and removed and, to make such payments monthly for ore mined and shipped during the preceding month. The lessees agreed to mine and ship a specified quantity of ore in each year, and, in default of this, to pay the lessors for the minimum amount specified, and take credit therefor and apply such sums upon ore mined and shipped thereafter in excess of such minimum. The lessees were to pay the taxes and to keep the property free from encumbrances and liens. Right was reserved to terminate the contract upon the failure of the lessees to comply with the terms thereof.

The form of the leases is shown in Exhibits 15 and 16, which were not in the printed record, owing to their length, but copies of which, pursuant to stipulation, have been sent to this court. An examination of Exhibit 16 shows that the lessees had the right to ter-

> minate and surrender the lease by giving the lessors, or those having their estate in the premises, sixty days' written action, and executing sufficient conveyance releasing all interest and right of the lesses in the premises with any improvements thereon, and surrendering the same in order and condition, etc., and that thereupon all liability of the lessees to taxes subsequently assessed on the demised premises or for rent thereof thereafter to accrue, or royalty in ores therefrom except on account of ores removed, should cease and determine; the lessees to be liable for all ores removed from the premises not theretofore paid for, and to pay for the premises rent or royalty for the year in which termination should be made, or the portion thereof which have expired, at the rate of $12,500 per annum.

In reviewing the Minnesota cases and adopting the construction of the State court that mining leases are not sales of ore in place, the opinion continues:

> These lands are situated in Minnesota, and this character of lease has long been familiar in that State, as a means of securing the development and operation of mining properties. Some years before the passage of the Corporation Tax Act, the Supreme Court of Minnesota had dealt with the character of such instruments. In the case of *State* v. *Evans*, 99 Minnesota, 220, that court, after a review of the English and American cases, said (p. 227):
>
> "The propriety of a lease for the purpose of developing and working mines is recognized by all of the cases, and the rule established by

> the great weight of authority that such leases do not constitute a sale of any part of the land, and, further, that iron or other materials derived from the usual operation of open mines or quarries, constitute the rents and profits of the land, and belong to the tenant for life or years, and to the mortgagor after sale on foreclosure, and before the expiration of the time for redemption. The rule, however, has no application to unopened mines in the absence of a contract, express or implied, for opening and leasing them." The same doctrine was held in *Boeing* v. *Oweley*, 122 Minnesota, 190, and in the last case of *State* v. *Royal Mineral Association*, 135 Minnesota, 332, in which the decision of the Circuit Court of Appeals in this case, that such leases were merely conveyances of the ore in place, was brought to the attention of the court, and that conclusion expressly denied, the Supreme Court of Minnesota saying:
>
> "We adhere to the doctrine of the *Evans and Boeing cases*, and hold these instruments leases. * * *"

Relying on the *Sargent Land Company case, supra*, the Supreme Court in *United States* v. *Biwabik Mining Co.*, 247 U. S. 116, again held that a Minnesota mining lease was not a conveyance of ore in place although the ore body could be measured with substantial accuracy. The Circuit Court of Appeals had held that the lessee was as much entitled as the fee owner to treat the value of his interest in the ore in the ground at the beginning of the tax period as

his capital and that such a lease was in every substantial way pro tanto a purchase. In reversing the Circuit Court, the Supreme Court said:

> This view of the character of these instruments and their legal effect differs from that taken by this court in the *Sargent Land Co. case*, 242 U. S. 503, wherein precisely similar iron ore leases were under consideration. In that case this court reached the conclusion that such leases were not conveyances of the ore in place, but were grants of the privilege of entering upon, discovering, and developing and removing the minerals from the land, and that the lessor's income from such operations was obtained by a corporation shown to be carrying on business, and upon principles laid down in previous cases in this court (*Stratton's Independence* v. *Howbert, supra; Stanton* v. *Baltic Mining Co.*, 240 U. S. 103), that such income was subject to taxation under the Corporation Tax Act of 1909.
>
> In the *Sargent Land Co. case* it was pointed out that the courts of Minnesota, certainly familiar with the physical characteristics of the ore deposits involved, had in a series of cases held these instruments to be leases, and that the royalties agreed to be paid were rentals in compensation for the privileges granted the lessee. We hold the conclusion of the Minnesota courts to be warranted by reason and authority (242 U. S. 503, and cases cited in margin, p. 518).

The Circuit Court in its opinion had distinguished the Sargent Land Co. case but in disapproving the attempted distinction the Supreme Court said:

> * * * The lessee takes from the property the ore mined, paying for the privilege so much per ton for each ton removed. He had this right or privilege under the form of lease here involved so long as he sees fit to hold the same without exercising the privilege of cancellation therein contained. He is, as we held in the *Sargent Land Co. case*, in no legal sense a purchaser of ore in place.

See also: *Chemung Iron Co.* v. *Lynch, Collector*, 269 Fed. 368.

It is settled by the above decisions that mining leases in Minnesota are not sales of ore in place and that lessees are not entitled to a deduction for depletion under the provisions of Section 12 (a) of the Revenue Act of 1916. The question of value as of March 1, 1913, of the ore in place therefore becomes immaterial so far as a lessee is concerned. The net income of the respondent was therefore properly stated in its original income tax return as $77,506.98, and the assessment of the tax upon that amount, which did not include a deduction for depletion, was correct.

(b) A lessee of a mine is not allowed any deduction for the depletion of the ore body under the provisions of the Revenue Act of 1916

It is the position of the petitioner that the depletion allowance under Section 12 (b) applies only to the physical exhaustion of the ore deposit. Part

second of Section 12 allows the taxpayer to deduct from his gross receipts certain losses "including a reasonable allowance for the exhaustion, wear, and tear of property arising out of its use or employment in the business or trade." This section is then subdivided into (a) and (b), and (b) provides "in the case of mines a reasonable allowance for depletion. * * *"

Webster defines the word "depletion"—"to empty or unload, as the vessels of the human system, by blood letting or by medicine." This definition clearly shows that depletion means the emptying of something physical. The word depletion is derived from the Latin word "deplere," which means "to empty out," and the word "deplere" is made up from the Latin word "plere," meaning "to fill" and when joined with "de" meaning the opposite; the verb deplere means "to unfill," "to empty."

The respondent is not a fee owner but a lessee. All it has under its lease is contractual right and these rights become exhausted, or more properly speaking, are exercised, when the contract is completed.

If Congress had intended that this section should apply to the exhaustion of a contractual right it would not have used the word "deplete." The word deplete is not used to express the idea that contractual rights are being exercised. The word depletion is used only "in the case of mines" and it is certain Congress used it in its ordinary sense; that is, the emptying of the ore deposits.

As was said by this court in the *Sargent Land Company case*, 242 U. S. 503, 524, in referring to what was meant by the word "depreciation":

> We think Congress used the expression in its ordinary and usual sense as understood by business men.

In *New Creek Company* v. *Lederer*, 295 Fed. 433, 437, the Circuit Court of Appeals for the Sixth Circuit said on this question:

> On the theory of the statute, as we read it, depletion allowance was intended as a return to the taxpayer of the original cost of the coal.

In that case certiorari was refused by this court. (*New Creek Co.* v. *Lederer*, 265 U. S. 581.)

The proviso in the same paragraph clearly indicates that the purchaser of the mineral deposits is the only one considered in the case of mines, and in the case of oil and gas wells. The proviso reads as follows:

> That when the allowance authorized in (a) and (b) shall equal the capital originally invested, or in case of purchase made prior to March 1st, 1913, the fair market value as of that date, no further allowance shall be made.

This proviso defines the limitation of the allowance—in ordinary cases to the capital originally invested, and "in case of purchase made prior to March first, nineteen hundred and thirteen, the fair market value as of that date." And these both are the cost or value of the property which is consumed or depleted.

In the case at bar, the corporation respondent made its leases before 1913, so it must come under the second clause.

But it can not come under the clause "in case of purchase" for that does not include a lease. It can refer only to the purchase of property. When one leases property he does not "purchase" it. The word purchase applies only to the ownership of property.

The word "purchase" as used in the proviso, plainly indicates that Congress had in mind only the purchaser of the ore deposit. The lessee did not purchase the ore deposit and the respondent does not contend that it is the purchaser in the present case. It was decided in *The Sargent Land Company case* and other cases cited, *supra,* that a lease of an ore property is not a sale of the ore deposit. The lessee did not purchase anything previous to March 1st, 1913. It merely made an agreement to mine ore and certainly did not purchase any property which could be exhausted by wear and tear or by its use or employment in the business. The lessee does not sustain a loss by mining, as does the owner. The owner loses his ore by mining, but the lessee loses all his rights under the lease by not mining. So far as depletion alone is concerned, the owner loses nothing if the ore is not mined. The rights of a lessee under a lease are not subject to physical exhaustion, wear and tear. The rights of the lessee are not employed or used in mining the ore. The lessee uses up and depletes the

physical property (the ore) of the owner in the busi
ness of mining. The lessee in the present case i
claiming a depletion allowance because of the deple
tion of the ore deposit not its own, but that of another
the owner. Congress did not intend that one party, a
lessee, should be allowed depletion for using up anothe
party's property in a business. Instead of the lesse
sustaining a loss by doing the business of mining, h
brings all his rights under the lease to fruition.

The respondent in this case acted under it
lease and instead of any loss to it there was a
gain. The rights of a lessee under a lease are no
part of the physical equipment of a mine, so as t
bring them under exhaustion, wear and tear, o
depletion from their use in the business of mining
The lessee has neither more nor less ore by workin
the lease. The owner is in an entirely different posi
tion. If the ore is not mined, he has it. If it i
mined, it is gone and he has no ore. It is the loss o
departure of this ore, not the right to dig it, fo
which the Act allows depletion. Thus, if the owne
of mines, either himself or through a lessee, doe
business of mining, there is to him an inevitable los
of his ore. And if the lessee does mining under hi
lease, there is no loss whatever of ore to him. Al
he has done is to exercise his rights to mine. Th
exercising of this right until the ore is exhausted i
not a thing for which depletion can be claimed. I
seems that the only question to determine in thi
case is what property is being depleted by bein

used or employed in the business of mining. In answer we submit that the only property used in the business of mining ore is the ore itself and the machinery used to mine it. And we also submit that the owner's ore has been used up, and the lessee's machinery has, to a certain extent, been used up; that for the ore used up the owner alone is allowed to take a deduction for "depletion," and that, so far as the machinery owned by the lessee is used up, he is allowed to take a deduction for "depreciation." The lease itself was not worn out or exhausted by the exercise of rights arising under it. The ore of the owner was depleted. The lease was still intact.

It is true that the rights of the lessee became less valuable each year, but this would be true of other parties. If, for example, the owner, instead of leasing the mine, were to contract with a party to mine all the ore for a fixed sum per ton, at which figure the contractor would have a profit, in such case the contractor would see that the final depletion of the mine would end his profit, but he would not be entitled to a deduction from his income profits because of the depletion of the mine.

Or, take another example, where the owner of the mine contracts for the hauling of the ore from the mine to the railroad and loading it. In such case if the contractor has a profitable contract, he realizes that each year's depletion of the mine cuts down the amount of profit he will be able to make in the future,

and when the mine is entirely depleted, the contract will have no more value. But it would not be contended that the contractor was entitled to a deduction from his income profits because of the depletion of the mine. This is not "depletion" but simply that the source of income has ceased.

But the contractors in these cases are in exactly the same position as the lessee, and if the lessee is entitled to such a deduction for depletion, the contractor in either example would be entitled to claim such a deduction for himself.

It is of course true that in many cases where the thing or right of contract is of great value to the owner there may be a lessening of value from year to year, without the owner being able to claim a deduction for it under some of the Internal Revenue Acts. These acts provide for a tax on all incomes, and then they provide for deductions in certain cases. And it is of course true that the deductions allowed by the respective revenue acts change, as experience shows is just or desirable. So where a corporation or an individual has a lease or contract such as were instanced hereinbefore, while the value of this may become less from year to year, the revenue act may not allow any deduction to the owner on that account.

Thus the Revenue Act of 1909 allowed for "depreciation" but nothing for "depletion" of mines. The Revenue Act of 1913 allowed for depletion of mines not to exceed 5% of the gross value of the output for the year. The Revenue Act of 1916 allowed for depletion of mines not to exceed the market value in

the mine of the output during the year, with the limitation given in the proviso quoted. And the Revenue Act of 1918 for the first time allowed depletion to a lessee by providing that the deduction for depletion of mines should be equitably apportioned between the lessor and lessee.

So the growth and development of the deduction is easily traced, and in no one of the cases is the change an interpretation of the previous existing law, but is a development, a change of the law itself.

And the question at issue in this case is the allowance for deduction for depletion under the provisions of the Revenue Act of 1916.

This Court referred to the depletion allowance under the Act of 1916, in the *Sargent Land case*, 242 U. S., 503, 525, in the following language:

> True, the value of the mine is lessened from the partial exhaustion of the property, and, owing to its peculiar character, can not be replaced. But in no accurate sense can such exhaustion of the body of the ore be deemed depreciation. It is equally true that there seems to be a hardship in taxing such receipts as income, without some deduction arising from the fact that the mining property is being continually reduced by the removal of the minerals. But such consideration will not justify this court in attributing to depreciation a sense which we do not believe Congress intended to give to it in the Act of 1909.
>
> It may be admitted that a fair argument arises from equitable considerations that, owing

> to the nature of mining property, an allowance in assessing taxes upon income should be made for the removal of the ore deposits from time to time. Congress recognized this fact in passing the Income Tax Section of the Tariff Act in 1913 (Section II, 38 Stat. 166, 167), when it permitted "a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business, not to exceed, in the case of mines, 5 per centum of the gross value at the mine of the output for the year for which the computation is made"; and in the Income Tax Law of September 8, 1916 (39 Stat. 756, 769), a reasonable allowance is made in the case of mines for depletion thereof, "not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made." These provisions were not in the Act of 1909, and, as we have said, we think that Congress, in that Act, used the term "depreciation" in its ordinary and usual significance. We therefore reach the conclusion that no allowance can be made of the character contended for as an item of depreciation.

This Court has in this decision clearly indicated that the depletion allowance in the case of mines, under the Act of 1916, applies to the "exhaustion of the body of the ore." It states that "the mine is lessened from the partial exhaustion of the property and can not be replaced." The court states that "the mining property is being continually reduced

by the removal of the minerals." The court also stated that an allowance "should be made for the removal of the ore deposits." The court then goes on to say that "Congress recognized this fact," in the Act of 1913 and in the Act of 1916. In other words, this court has stated that Congress recognized the fact that an allowance should be made for the removal of the ore deposits, and we submit that under the Act of 1916, an allowance for the removal of the ore deposits was for the owner and the owner alone, of the physical property—the ore deposits. The Act of 1916 in the case of mines does not provide, no matter how broad an interpretation may be made, for the exhaustion of the contractual rights of a lessee under his lease. Congress did not provide, under this Act, that one party, the lessee, be given an allowance for the depletion of another's (the owner's) ore deposit.

The position of the Government in allowing depletion only to the fee owner has received the sanction of the courts and the identical question, now before this court, has been decided adversely to the defendant in error's contentions by the Circuit Court of Appeals for the Sixth Circuit, in *Weiss, Collector*, v. *Mohawk Mining Co.*, 264 Fed. 502. That case was the culmination, under the Revenue Act of 1916, of various attempts on the part of lessees and lessors of mining property to establish their right to depletion under the earlier revenue acts of 1909 and 1913.

All of the leases involved in the *Mohawk case*, as in the case at bar, are in the usual form of mining lease

generally used in Minnesota in connection with the leasing of iron ore lands. The provisions of the leases in no sense constitute a sale of ore in place, but provide merely for the payment of rents and royalties for the privilege of mining and removing the ore. These facts bring the case squarely within the rule announced in the *Mohawk Mining case*.

The Mohawk Mining Company was a Minnesota corporation. On March 1, 1913, it was lessee of certain iron mining property in Minnesota. By the terms of the lease it was to pay the fee owners a royalty of 25 cents per ton, was to pay a certain minimum each year, and was given a term amply long enough to permit extraction of all the ore on the premises. The amount of ore in place March 1, 1913, was known with substantial accuracy, and its value at that time in the ground was known to be substantially 50 cents per ton; in other words, 25 cents per ton in addition to the royalty which must be paid when it was taken out. The plaintiff's theory was that the net operation proceeds of such ton of ore thereafter mined should be carried, 25 cents to royalty account, 25 cents to the capital account as of March 1, 1913, and the balance to profit. Under the Act of September 8, 1916, the Mohawk Company claimed an allowance for depletion to the extent of 25 cents excess per ton, claiming that that represented the value of its interest on March 1, 1913, which had been consumed by the mining operations for the period covered by its tax return. The Court said:

The only question involved is whether the Mohawk Company, because it is only lessee, is not entitled to the allowance which it is conceded would be rightful if it were the fee owner. Counsel for the taxpayer urge several reasons why this depletion should be allowed to the lessee in some cases as it is in others to the fee owners, among which are that by the words of the statute, the allowance is made to the taxpayer rather than either to owner or to lessee; that it would be natural for Congress to intend such allowance to be made to the party which actually suffered the substantial depletion, and that this, in a case like the present, is the lessee; that the contrary theory necessitates the allowance of the depletion to the lessor in this and all cases of royalty losses, with the result that while the lessor's only interest in the property is the royalty, and while the royalty is taxable income, the lessor will have a depletion allowance which will wipe out the royalty and leave him with no tax to pay, and this is said to be an absurd result; and that, under the wording of the act and the regulations of the department (in particulars which we have not set out), if the Mohawk Company had bought this lease from a former lessee on the 2nd day of March, 1913, for the existing market price of ore in place, it could have had this allowance which it now claims (under the mere subterfuge of calling the purchase price "advance rental"), while the law plainly intends that the owner, on March 1st, and the purchaser

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on March 2d, of any particular interest shall be treated alike.

These contentions would deserve serious consideration if the questions involved were open; but we can not think that they are. We can not conceive any substantial distinction as applied to a mine between that depreciation or allowance for capital assets consumed which was sought by mine owners under the earlier acts and that depletion which was expressly allowed by the amendment of 1916. From every point of view this kind of depreciation or allowance was depletion, and this allowed depletion is depreciation or diminution of capital, and when the question of right to the allowance arises as between fee owner and lessee it can make no difference whether the claimed allowance is called by one name or by the other. In *U. S.* v. *Biwabik Co.*, 247 U. S. 116, 36 Sup. Ct. 462, 62 L. Ed. 1017 (arising under the act of 1909), it was ruled, after full consideration, that under a lease practically identical with the Mohawk lease now involved the nature of the interest held by the lessee was not such as to permit it to claim the allowance, but that the contingencies which attended the character of the lessee's interest barred it from claiming that its capital assets had been diminished. It is true that the question whether the mining of ore could be considered depreciation in any event was underlying, and that this question has been completely removed by the amendment of 1916; but the Supreme Court did not rest its conclusion at all upon the definition of depreciation.

We do not overlook counsel's argument that the question really involved in the *Mitchell and Biwabik cases* was whether the proceeds of a sale of capital assets should be eliminated from the receipts of the year before the gross income was stated and hence did not reach an allowance of a business loss during the year permitted to be deducted from the gross income, which character the depletion allowance is said to bear; but we think the provision regarding depletion, in real substance and effect, pertains to a consumption of capital assets rather than to a business loss. We also observe that, by virtue of the effect of the minimum royalty provisions in the Mohawk lease, it was, on March 1, 1913, under an affirmative obligation to remove—or at least to pay for—about two-thirds of the ore then in the ground and that this affirmative obligation probably covered all the ore mined during the taxing periods now involved. However, no controlling force has been put, in the former cases, upon the presence or absence of this affirmative obligation, and we are inclined to regard its extent as an incident of a particular case which cannot control the general rule.

Holding this view as to the equivalency, for this purpose, between "depreciation," "consumption of capital assets," and "depletion," and as to the effect which must be given to the decision in the *Biwabik case*, it follows that the judgment below must be reversed, and judgment entered for the defendant, and the case is remanded for that purpose.

On Petition for Rehearing (page 605):

Per Curiam: The application for rehearing points out that, in some of the cases cited in the opinion, allowance or credit for materials exhausted was sought or allowed on the ground that they represented, not income at all, but capital assets consumed, and that the opinion erroneously refers to some of these as if they all involved "depreciation." The correction of whatever inaccuracy there is in the opinion in this respect does not affect our conclusion. In the *Biwabik case*, the lessee was not heard to say that his capital assets had been consumed by his mining operations, and we interpret that decision as rooting in an essential degree on the idea that the nature of the lessee's title forbade him to make this claim. We can not read the decisions of the Supreme Court as having determined that the exhaustion of ore reserves is so inherently a business loss, rather than an impairment of capital, that a statutory grant of the right to deduct for depletion on that account will reach a case which has been adjudged not to involve the diminution of capital assets. We think the substantial principles established by the decisions are that both the royalty received by the fee owner and the sums received by the operating lessee above the cost of operation are income; that the statutory reduction for "depletion" can not be twice credited, once to the fee owner, and once to the lessee; and that the exemption belongs of right to the fee owner.

> The application for rehearing must be denied, but the opinion will be refiled, with corrections in the matter indicated. (*Weiss* v. *Mohawk Mining Co.*, 264 Fed. 502, 504, 505, 506.)

A petition for certiorari was then filed with the Supreme Court to review this decision, assigning the following reasons:

> 1. The construction of Section 12 of the Revenue Act of 1916 with respect to the depletion allowance has never been before this court, nor before any lower court except in the instant case.
>
> 2. The question involved is of great general importance affecting the liability for taxes of lessees of mineral property throughout the United States. When iron ore, copper, lead, zinc, oil, gas, and precious metals, are considered, lessees include many thousands of taxpayers and the taxes involved amount to a large sum of money.
>
> 3. *United States* v. *Biwabik Mining Company*, 247 U. S. 116, which the Circuit Court of Appeals regarded as decisive of this case, arose under the Excise Tax Act of 1909 while the case at bar arises under the Act of 1916. We believe the Circuit Court of Appeals misinterpreted the provisions of the 1916 Act, giving a reasonable allowance in cases of mines, and the purpose of Congress in granting such allowance, and misconceived the effect of the decision of this court in the *Biwabik case*. (Page 6, Petition for Certiorari in *Mohawk Mining Co.* v. *Weiss.*)

The petition was denied October 18, 1920, *Mohawk Mining Co.* v. *Weiss*, Collector, 254 U. S. 637.

(c) The provisions of the Revenue Act of 1918, which apportioned the deduction for depletion between the lessor and fee owner of mining property, are not a construction by Congress of the provisions of the Revenue Act of 1916, but a new law.

Respondent contended in the lower Court that the Revenue Act of 1918, which apportioned the deduction for depletion between the lessee and the fee owner of mining property (Sec. 234 (a) (9)) was an interpretation by Congress of the meaning to be given to the provisions of the Revenue Act of 1916. In this connection it is sufficient to say that the two acts are separate and distinct and that the Revenue Act of 1918 in express terms repeals the provisions of the Revenue Act of 1916.

In the report of the Revenue Act of 1916 of the managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendments of the Senate, the following appears:

> The House agreed to the Senate amendment that an amendment providing that the Secretary of the Treasury should have power to make rules and regulations with reference to the allowance allowed for the exhaustion of oil and gas wells and mines, and eliminating the provision with reference to timber as this portion of the amendment was not necessary in view of the fair market value of property on March 1, 1913, being agreed upon as the date for the basis for determining the amount

> of the gain derived from the sale or disposition of property. (Congressional Record, Vol. 53, Part 13, p. 14110.)

This shows that the allowance for the exhaustion (depletion) of mines in the Act of 1916 was considered to apply only to the owner of the *property*.

In the report of the Committee on Ways and Means in the Revenue Act of 1918, submitted September 3, 1918, by Mr. Kitchin, the following appears on page 10:

> The depletion provision of existing law does not grant an allowance for cost of development. In the case of mines, oil and gas wells, such an allowance seems only equitable and fair and the bill provides that a reasonable allowance in such cases be allowed for depreciation of improvements. *The bill also corrects an inequality of the present law* by providing for an equitable apportionment of the depletion allowance between lessor and lessee. [Italics ours.]

Respondent insists in fact that the Act of 1916 already provides for this apportionment which it claims for itself, for its claim for deduction apportions it between the lessor and the lessee.

But the report quoted shows that Congress understood that this provision of the Revenue Act of 1918 was not an interpretation of the 1916 Act but was an amendment, and this was an entirely new provision, to correct an inequality of the 1916 law.

That the contention of the respondent in this particular is without merit is shown by the decision

of this Court in the case of *United States* v. *Stanley Field, Executor of Kate Field*, 255 U. S. 257. With reference to that case, the Revenue Act of 1916 did not in express terms include property passing under a power of appointment as part of the gross estate of a decedent for the purpose of computing the estate tax. The Revenue Act of 1918, however, expressly included such property as part of the gross estate, and it was argued on behalf of the Government that the 1918 Act was interpretative of the proper construction to be given the provisions of the 1916 Act. This Court, in refusing to adopt this construction, said:

> It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed; and none was expressed in the Act under consideration. In that of February 24, 1919, which took its place, the section providing how the value of the gross estate of the decedent shall be determined contains a clause precisely to the point (Sec. 402 (e), 40 Stat. 1097):
>
> "To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except," etc.
>
> Its insertion indicates that Congress at least was doubtful whether the previous Act included property passing by appointment. (See *Matter of Miller*, 110 N. Y. 216, 222; *Matter of Harbeck*, 161 N. Y. 211, 217–218;

United States v. *Bashew*, 50 Fed. 749, 764.) The Government contends that the amendment was made for the purpose of clarifying rather than extending the law as it stood, and cites a statement to that effect in the Report of the House Committee on Ways and Means (House Doc. No. 1267, p. 101, 65th Cong., 2d Sess.). It is evident, however, that this statement was based upon the interpretation of the Act of 1916 adopted by the Treasury Department. The same report proceeded to declare (p. 102) that "The absence of a provision, including property transferred by power of appointment, makes it possible, by resorting to the creation of such a power, to affect two transfers of an estate with the payment of only one tax"; and this, together with the fact that the committee proposed that the law be amended, shows that the Treasury construction was not treated as a safe reliance. (*United States* v. *Field*, 255 U. S. 257, 264.)

In the case of *Lynch* v. *Hornby*, 247 U. S. 339, it was argued that the Revenue Acts of 1916 and 1917 were declaratory of the meaning of the 1913 Act. In refusing to so hold this Court said:

> In the more recent Income Tax Acts, provisions have been inserted for the purpose of excluding from the effect of the tax any dividends declared out of earnings or profits that accrued prior to March 1, 1913. This originated with the Act of September 8, 1916, and has been continued in the Act of October 3, 1917. We are referred to the legislative history of the Act of 1916, which it is contended

> indicates that the new definition of the term "dividends" was intended to be declaratory of the meaning of the term as used in the 1913 Act. We can not accept this suggestion, deeming it more reasonable to regard the change as a concession to the equity of stockholders granted in the 1916 Act, in view of constitutional questions that had been raised in this case, in the companion case of *Lynch* v. *Turrish*, and perhaps in other cases * * * (pages 345–346).

And with reference to a like contention regarding the Revenue Acts of 1916 and 1918 as interpretative of the Acts of 1913, this Court said in the case of *Penn Mutual Life Insurance Co.* v. *Lederer, Collector*, 252 U. S. 523, at page 535:

> The Penn Mutual Company, seeking to draw support for its argument from legislation subsequent to the Revenue Act of 1913, points also to the fact that by the Revenue Act of September 8, 1913, c. 463, 39 Stat. 756, 768, Sec. 12, subsections second, subdivisions c, the rule for computing gross income there provided for mutual fire insurance companies was made applicable to mutual employers' liability, mutual workmen's compensation, and mutual casualty insurance companies. It asserts that thereby Congress has manifested a settled policy to treat the taxable income of mutual concerns as not including premium refunds; and that if mutual life insurance companies are not permitted to "exclude" them, these companies will be the only mutual concerns which are thus discrimi-

> nated against. * * * If such later legislation could be considered in construing the Act of 1913, the conclusion to be drawn from it would be clearly the opposite of that urged. * * *

And, again, on pages 537–538 the following:

> In support of the company's contention that the interpolation of the words "within the year" is necessary in order to support the construction given to the act by the Circuit Court of Appeals we are asked to consider the legislative history of the Revenue Act of 1918 (enacted February 24, 1919, c. 18, 40 Stat. 1037); and specifically to the fact that in the bill as introduced in and passed by the House, the corresponding section (233 (a)) contained the words "within the taxable year" and that these words were stricken out by the Conference Committee. (Report No. 1027, 65th Cong., 3d Sess.) The Legislative history of an act may, where the meaning of the words used is doubtful, be resorted to as an aid to construction. (*Casimetti* v. *United States*, 242 U. S. 470, 490.) But no aid could possibly be derived from the legislative history of another act passed nearly six years after the one in question. Further answer to the argument based on the legislative history of the later act would, therefore, be inappropriate.

It is apparent from the foregoing authorities that the provisions of the Revenue Act of 1918 have no connection whatever with the provisions of the Revenue Act of 1916. It is unfair to accuse Congress of doing a vain and useless thing, and certainly it would be vain and useless to enact into law the interpretation of an existing law.

If the claim of respondent is right in this case, then the Court must hold that the provision in the Revenue Act of 1918, Sec. 234 (9)—

> In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessees—

is useless and vain. The claim of respondent is that it was the law before Congress stated it, and when it enacted that provision in the law of 1918 it did a vain, useless, and unnecessary thing.

The necessity for enacting the provisions of the 1918 law regarding depletion allowance and its apportionment conclusively proves that the provisions of the 1916 law could not be interpreted in the manner contended for by the respondent.

In the decision of the Circuit Court of Appeals in this case, reference is made to the fact that the Treasury Department by Treasury Decision No. 3386, under date of August 22, 1922, held that a lessee of an oil or gas well was entitled to depletion under the Revenue Act of 1916. The Department made this ruling because it understood the decisions of this Court to hold that there was no ownership of oil or gas in place, under the ownership of the land, so

interpreting the cases of *Brown* v. *Spillman*, 155 U. S. 665; *Ohio Oil Co.*, v. *Indiana*, 177 U. S. 190; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229; *Walls* v. *Midland Carbon Co.*, 254 U. S. 300.

But this position of the Department is consistent with the denial of deduction for depletion of mines. For it holds in both cases that depletion should be allowed to the owner of the substance or product (whether oil, gas, or ore) of the mine, and this Court has expressly held that under these mining leases, the lessee does *not* own the ore, and the Department understood this Court to hold that in the case of oil and gas, the ownership of the surface did not give ownership of the oil and gas in place, but that it belonged to the lessee (or other party) who reduced it to possession. So that when the reasoning and reason of the Department's Treasury Decision No. 3386 is understood, it is seen that it is the only possible ruling which is consistent with the holding in this case of a mine.

We believe that in our argument we have shown the error of the Court of Appeals, the opinion of which is mainly to show that the *Mohawk case*, *supra* was incorrectly decided and that the *Biwabik case*, *supra*, does not apply in the case at bar.

CONCLUSION

It is submitted that the respondent, a lessee of mining property, is not entitled to the deduction for depletion allowed under the provisions of Section 12 of the Revenue Act of 1916, and therefore the judgment of the lower Court, in so far as it allowed this depletion, should be reversed.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.
MERRILL E. OTIS,
Special Assistant to the Attorney General.

DEC 26 1924

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1924.

No. 273.

MARGARET C. LYNCH, Executrix of the Last Will and Testament of E. J. LYNCH, Deceased,

Petitioner,

vs.

ALWORTH-STEPHENS COMPANY,

Respondent.

RESPONDENT'S BRIEF

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The lessee, as well as the lessor, owned a valuable property interest in the mine, by reason of which under the express terms of the Revenue Act in force in 1917, *the lessee, as well as the lessor, was entitled to a deduction from its gross income, of a reasonable allowance for exhaustion of its leasehold interest by reason of depletion of the mine, in arriving at its net taxable income, but the lessor's and the lessee's deductions were not to exceed the total market value in the mine of the product thereof which was mined and sold during the year, provided that where the interests were acquired prior to March* 1, 1913, *the total allowance so made should not exceed the fair market value in the mine as of that date, the respective deductions of the lessor and lessee to be allowed according to the value of their respective interests in the property as lessor and lessee.* 13

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III.

Even should the Court decide that the foregoing propositions are incorrect, still the judgment should be affirmed, since in 1917 the Alworth-Stephens Company had no invested capital or only a nominal capital and properly was assessable under Section 209 of the Act of September 8, 1916, as amended by the Act of October 3, 1917, in force for the year 1917, which would result in at least as large a judgment in its favor. 6

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Respondent.

RESPONDENT'S BRIEF

I.

THE ISSUE

Long before March 1, 1913, the Alworth-Stephens Company became the owner under two mining leases of a vested property interest in each of the Minnesota iron mines here in question, and prior to that date had executed sub-leases to other parties, covering both mines, at a substantial advance in royalty. The Company's property interest in each of the mines in question was gradually exhausted by its use and employment in the business of mining the ore during the year 1917.

The Alworth-Stephens Company has claimed for the year 1917 a reasonable allowance for depletion of its said property and estate in the course of such operations during that year.

This case presents the following question for determination: *Under the Revenue Tax Law as it existed in* 1917, *is a lessee of a mine, who is also a lessor, entitled, as well as a fee owner, to deduct from its gross income for that year a reasonable allowance for the depletion of its property interest in that mine to arrive at its net taxable income?*

STATEMENT

The decision of the District Court by Judge Morris is reported in 278 Fed. 959, and the decision of the Circuit Court of Appeals, written by Judge Sanborn, is reported in 294 Fed. 190, and copied in the Record pages 196 to 202.

The District Court's decision, above reported, sets forth in full its findings of fact, and the Circuit Court of Appeals says concerning this:

> "The finding of facts and the computations of the court below, which it set forth with commendable clearness, accuracy and patience, are not challenged in this court."

The decision written by Judge Sanborn of the Circuit Court of Appeals carefully reviews the statutes and authorities applying to the question here involved and affirmed the lower court's decision. Judge Sanborn's opinion is as clear and forceful a statement as can be made.

The pertinent facts found by the District Court briefly may be summarized as follows:

The Alworth-Stephens Company made its income and excess war profits tax return to the Government covering the year 1917, showing a tax due of $10,253.21, which sum it duly paid. Thereafter the Internal Revenue Department assessed an additional

tax for the year 1917 in the sum of $17,128.44 and forced the Company to pay that amount, which it did under protest on February 21st, 1919.

This action was instituted against the Collector, to recover on the ground that the additional tax was illegally levied and collected, and the judgment and decree ordered the refundment of this amount with interest from the date when it was paid to the Government. The action was started against E. J. Lynch, Collector of Internal Revenue for the District of Minnesota, to whom the tax had been paid. He answered and after the trial died, and his executrix was substituted by stipulation and order, but of course the judgment, under the practice, is to be paid by the Government and is in form only against the Collector and his executrix. The action was tried in the District Court without a jury pursuant to stipulation of the parties (Record p. 16). The findings of the District Court and order for judgment, dated March 30th, 1922, set out in detail the facts (Record pp. 22 to 29). The judgment of the District Court, entered on the same date, for $17,128.44, plus interest, making a total of $20,322.89, is set out at page 31 of the Record.

The Alworth-Stephens Company is a Minnesota corporation, organized in March, 1907, with an authorized capital of $100,000. $25,000.00 of this was subscribed and paid for in cash immediately on organization and certificates of stock were issued therefor. No more stock has ever been paid for or issued. The certificates were outstanding in 1917 (Rec. p. 12).

At the organization of the company, M. H. Alworth assigned to it, an exploratory option from certain fee owners, covering about 5,000 acres of land in Minnesota, which gave the Alworth-Stephens Company the right to take leases on various subdivisions at a royalty of 30c per ton on iron ore, such leases to run for fifty years, and obligated the company to do certain exploratory work . Its two leases were purchased of the fee owners pursuant to this option and in consideration of its fulfilling its agreement with the fee owners.

Certain explorations were conducted by the Company and two mining leases were taken by it from the fee owners and sub-leases made and all of the balance of the lands under the option were released and surrendered to the fee owners. (p. 24). The Company during 1917 had no income whatsoever, except from these two sub-leases, made by it, which mines were known as the Perkins and Hudson mines. (Record p. 23).

Perkins Mine.

In 1908, through explorations conducted by the Alworth-Stephens Company, a small mine located on an eighty-acre tract was discovered, which became known as the Perkins Mine. Pursuant to its option for a lease from the fee owners, the Company called for a lease at 30c per ton royalty, and immediately sub-leased the property at 75c per ton, 30c of which it had to pay the fee owners, its lessors, leaving it a net royalty of 45c per ton (Record pages 24 and 25).

Hudson Mine.

In July, 1908, the Alworth-Stephens Company granted an option for a sub-lease on another forty-acre tract, which thereafter became known as the Hudson Mine, and called for and obtained a lease from the fee owners at 30c per ton and sub-leased this property at 60c per ton, 30c per ton of which amount had to be paid to the fee owners, leaving the Alworth-Stephens Company a net royalty of 30c per ton on this property (Record pages 25 and 26).

These two leases and two sub-leases are the only ones involved in this case, since as early as 1915 the Company surrendered to the fee owners all lands covered by its original option except those covered by these two leases, and never had any other property. On obtaining their sub-leases, the sublessees from the Alworth-Stephens Company proceeded to strip the two mines in question — that is, remove by steam shovel the overburden of earth from

the ore, so that the ore itself could be mined by the steam shovel method (Record pages 26 and 27). This stripping is, of course, a very expensive matter, as it means the entire removal of the surface from the entire ore body, and in such mining operations the surface is sometimes removed from the entire mine to a depth of 150 feet or more, so that railroad cars and engines are run down to this depth and the ore loaded direct from its natural place in the ground into railroad cars and shipped out. We do not mean that the surface in these particular mines was removed to that depth, but it was removed to whatever depth was necessary to reach the ore. This stripping as to these two mines entirely had been completed by 1912, so that the ore was all exposed and ready for loading by steam shovel and could be measured accurately. This work of course rendered the ore as it lay in the ground very valuable in each mine. As the evidence proved, without dispute, and as the court found, the ore was worth, so uncovered, on March 1st, 1913, considerably upwards of 75c per ton (Record pages 26 and 27 and 43 to 57). On March 1st, 1913, it was known that it would take not to exceed seven years from that date completely to remove all the ore from both mines, in substantially equal annual installments (Record pages 26, 38, 50). The ore in both mines was in fact removed and the leases and sub-leases surrendered in considerably less than seven years (Record pages 28 and 29). But figuring seven years, as the court did, for time of removal, is much more favorable to the Government as showing the March 1st, 1913, value of the respondent's interest in the property than the lesser time which it in fact took to remove the ore, for if the lesser time had been figured, the March 1st, 1913, value, and therefore the amount deductible, would have been increased. (p. 39).

The lease from the fee owners to the Alworth-Stephens Company on the Perkins Mine is set forth in Exhibit F, Record pages 124 to 129. The sub-lease from the Alworth-Stephens Company on the Perkins Mines is set forth in Exhibit G, pages 131 to 138. The lease from the fee owners to the Alworth-Stephens Company on the Hudson Mine is set forth in Exhibit I,

Record page 145 to 152. The sub-lease from the Alworth-Stephens Company on the Hudson Mine is set forth in Exhibit J, page 152 to 158.

The leases called for quarterly payments of royalty. The lower court therefore found that the present March 1st, 1913, value of every dollar that the Alworth-Stephens Company would receive from royalties on its property interests in the two mines and leases was 71.9c (Record, pp. 26 and 27), which amount is the March 1st, 1913, average value of a dollar per year, payable quarterly, for seven years, on a 9% discount or risk basis—that is, figuring that the Alworth-Stephens Company would receive its returns from these properties in equal annual installments, paid quarterly, over a period of seven years, the March 1st, 1913, value of the average dollar that it would so receive is 71.9c (Record pages 26 and 27). The court therefore found that in figuring its federal income and war profits tax for the year 1917 the Company was, under the statute, entitled to deduct for depletion 71.9c from each dollar of its *gross income*, to arrive at its *net taxable income*. In other words, that it was entitled to deduct the March 1st, 1913, value of its property interest, represented by the lease, in the ore in place in the mine, which had been mined and sold during the year 1917, in arriving at its net taxable income (Record p. 27). Another way of figuring, which arrives at the same result, is to take as the March 1st, 1913 value of the Company's property interest through its leases of the mines, 71.9% of the net royalty the Company received on each ton of ore, which 71.9% of the net royalty of 30c per ton which the Company received on the Hudson Mine or lease amounts to 21.57c per ton, and 71.9% of the net royalty of 45c per ton on the Perkins Mine or lease amounts to 32.355c per ton for that property (Record p. 26). This net property interest value was over and above the entire royalties the respondent Company had to pay the fee owners.

These amounts the court found were the reasonable allowances for depletion contemplated by the statutes which the tax-

payer Alworth-Stephens Company was entitled to deduct from its *gross income*, to arrive at its *net taxable income* (Record p. 27). The court also found that said allowances, plus all allowances made in figuring the federal taxes paid in previous years, did not equal the fair market value of respondent's property interest in the properties as of March 1st, 1913, and this allowance did not exceed the fair market value in the mine of the ore mined and sold during the year 1917, which value the court finds was in excess of the full amount of both the net royalties received by the Alworth-Stephens Company plus the total amount of royalties going to the fee owners (Record p. 27, paragraphs 13 and 14).

The computation of the tax made by the lower court is set forth in Exhibit A attached to the decree (Record pp. 29 and 30). The Department has never claimed that this computation was in any respect incorrect, if the Alworth-Stephens Company was entitled to any deduction whatever for depletion. In fact, the District Court adopted the contentions of the Department as to the rate of discount, to find the March 1st, 1913, value, and allowed a 9% discount or risk rate as against the contention of the Alworth-Stephens Company that it should not be more than 6%, and if the rate had been 6% we would have been entitled to a considerably larger deduction. As it was figured, however, it will be seen that the excess profits tax on a part of the income amounted to 60% thereof, in addition to the income tax of 6%. This computation shows that the total gross receipts of the Company (after paying the fee owners their royalty) for the year 1917 amounted to $77,505.98, from which is deducted for depletion 71.9% on account of the March 1st, 1913, value of the company's leasehold or property interest for the returns of 1917, amounting to $55,726.80, leaving a net taxable income for that year of $21,779.18 (Record pp. 28 to 30). On this last amount the income tax amounted to $735.70 and the excess war profits tax to $9,517.51, or a total of $10,253.21, which was the exact amount the Alworth-Stephens Company originally paid the Government on the return made by it. This Exhibit A also

shows an excess payment to the Government of $17,128.44, which was the exact amount of the additional payment the Government demanded and which the Company paid under protest, and for which judgment was entered. (pp. 28 to 30).

While it is true that the Alworth-Stephens Company in its original tax return for 1917 computed its tax on a different theory, yet the amount that it computed and paid was exactly the amount which the court found that it should have paid, and the question here is whether the finding and conclusion of the District Court was correct, and, as the District Court says in its findings and order for judgment (Record p. 29, par. 18):

> "It is deemed unnecessary and tending to confuse rather than clarify the issues to set forth in detail the contentions or claims which were from time to time made by both the government and the plaintiff."

Suffice it to say that the Alworth Stephens Company in its original return in 1917 computed and paid its tax under Section 209 of the Act of October 3, 1917, and the Revenue Department assessed it an additional $17,128.44 under Section 210 of that act, which is the one which provides that in case the Department is unable in any case satisfactorily to determine invested capital, the Department shall determine the tax simply by arbitrarily comparing the taxpayer in question with some other taxpayers (not designated) in the same line of business and assess the tax accordingly. We had the matter up through long correspondence with the Internal Revenue Department, and, as appears by this correspondence, the Department, through Commissioner D. C. Roper and his Chief Assistant, P. S. Talbert, agreed with the justice and equity of our claim and an order for refund was made pursuant to these interviews in an amount several thousand dollars larger than the judgment herein gives us, and was approved, but stated that as this allowance would involve a modification of the regulations then existing, it must

receive the approval of the Solicitor of the Department (see Record pp. 171 to 177). It also appears that on our interviewing him he was entirely satisfied with the justice of our claim, but wished a brief, showing whether there was any court decision preventing the allowance, and assured us in effect that if there was not he would approve the allowance and modification of the regulation. On the writer's return to Duluth and within a comparatively few days, such a brief was furnished, which showed conclusively that there was no such decision. The *Weiss* case, hereinafter mentioned, had not at that time been decided by the District Court, but it was decided by the District Court during this correspondence in favor of a refund (Record p. 174). However, the Solicitor's Department finally decided not to give its approval to the refund which had been recommended by Mr. Roper and Mr. Talbert, (p. 176) undoubtedly as Mr. Miller, who was then the Solicitor for the Department, found that he was about to retire from office and did not wish to commit his successor to a modification of the regulations which he and Commissioner Roper and his Chief Assistant, P. S. Talbert, all frankly admitted worked great injustice and hardship. (pp. 86 and 87). The italics in this brief are as a rule our own in quotations.

THE STATUTES

For the convenience of the court in considering the questions here discussed, we here assemble the provisions of the Federal tax law from its inception in 1909 down to the present, as relating to the deductions allowed from *gross income* to arrive at the *net taxable income*, and showing the changes in the law made by the different statutes or amendments.

Act of August 5th, 1909.
36 *Statutes*, 113.

This statute provided, in Section 38, for deductions *from gross income* of the following:

"First: All ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges, such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property.

Second: All losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies, the sums other than dividends paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds.

Third: Interest actually paid, etc.

Fourth: All sums paid for taxes, etc.

Fifth: All amounts received by it within the year as dividends upon stock of other corporations, etc.

Act of October 3, 1913,
38 *Statutes*, 166, 167.

This act provided that there should be allowed as deductions from the income of corporations the following:

First: All the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals or other payments required to be made as a condition to the continued use or possession of property.

Second: All losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation by use, wear and tear of property, if any; *and in the case of mines a reasonable allowance for depletion of ores and all other natural deposits, not to exceed five per centum of the gross value*

at the mine of the output for the year for which the computation is made.

Act of September 8, 1916,
39 Statutes at Large, 759.

This act, which is the one here involved, provided for deductions *from gross income* of corporations as follows:

Sec. 12 (a). In the case of a corporation, joint stock company or association, or insurance company, organized in the United States, such *net income* shall be ascertained by deducting from the *gross amount* of its income received within the year from all sources:—

First: All the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity.

Second: All losses actually sustained and charged off within the year and not compensated by insurance or otherwise, including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade; (a) in the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; (b) *in the case of mines, a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made,* such reasonable allowance to be made in case of both (a) and (b) under rules and regulations to be prescribed by the Secretary of the Treasury: *Provided, that* when the allowance authorized in (a) and (b) shall equal the capital originally invested, *or in case of purchase made prior to March 1st, 1913, the fair market value as of that date,* no further allowance shall be made.

In Section 2 of the Act, defining income, subdivision (c) (39 Statutes at Large, 758) reads as follows:

> (c) For the purpose of ascertaining the gain derived from the sale or other disposition of property, real, personal, or mixed, *acquired before March 1st, 1913, the fair market price or value of such property as of March 1st, 1913, shall be the basis for determining the amount of such gain derived.*

Act of October 3, 1917,
40 Statutes at Large, 303 to 307.

This act did not change the act of September 8th, 1916, so far as relates to the matter of depletion, here under consideration, but this act provided for a war excess profits tax, and the sections relating thereto which will be later principally considered are Section 201, page 303, Section 203, page 304, Section 209, page 307, and Section 210, page 307.

War Revenue Act of 1918,
Volume 40, page 1077 et seq.

This law provides, in Section 234, subdivision (9), page 1078, for deductions from gross income as follows:

> "In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost, including cost of development not otherwise deducted: Provided, That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date: Provided further, That in the case of mines, oil and gas wells, discovered by the taxpayer, on or after March 1, 1913 and not acquired as the result of purchase of a proven tract or lease, where the fair market value

of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery, or within thirty days thereafter; such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. *In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee.*"

II.

ARGUMENT

The lessee, as well as the lessor, owned a valuable property interest in the mine, by reason of which under the express terms of the Revenue Act in force in 1917, *the lessee, as well as the lessor, was entitled to a deduction from its gross income, of a reasonable allowance for exhaustion of its leasehold interest by reason of depletion of the mine, in arriving at its net taxable income, but the lessor's and the lessee's deductions were not to exceed the total market value in the mine of the product thereof which was mined and sold during the year, provided that where the interests were acquired prior to March* 1, 1913, *the total allowance so made should not exceed the fair market value in the mine as of that date, the respective deductions of the lessor and lessee to be allowed according to the value of their respective interests in the propert yas lessor and lessee.*

If the above proposition is correct, the judgment herein and the decisions of the District and Circuit Court of Appeals are correct.

At the outset of our argument, let us make perfectly clear some things that we do not claim.

(1) We admit, for the purpose of argument, that royalties

received by our Company were gross income under the decisions of this court.

(2) We do not claim that a lessee is entitled to deduction *as against a fee owner and lessor* or exclusive of such lessor. We admit and claim that they are both entitled to a deduction for depletion according to the value of their respective interests in the property as represented by fee and lease, as such interest existed on March 1st, 1913, where those interests were purchased or acquired prior to that time.

(3) We do not claim that the respondent, as lessee, was technically the purchaser of the legal title to the ore in place in the mine. But the lessee did have a vested property interest and estate in the mine, through its lease, and exclusive right to mine and remove the ore and convert it into cash, and its property interest and value in the mine were gradually exhausted by depletion, through the mining and selling of the product of the mine during the year, exactly as in the case of the fee owner.

Both lessor and lessee are taxpayers. The statute in force in 1917 is above quoted from the Act of September 8, 1916, 39 Statutes at Large, 759, and the portion thereof here important is, as above quoted:

> "Section 12 (a). In the case of a corporation * * * *such net income* shall be ascertained by deducting from the *gross amount of its income* received within the year from all sources:
>
> "Second—all losses actually sustained and charged off within the year and not compensated by insurance or otherwise, including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade * * * (b) *in the case of mines, a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made.* * * * *Provided, that when the allowance authorized in* (a) *and*

(b) *shall equal the capital originally invested, or in case of purchase made prior to March* 1st, 1913, *the fair market value as of that date, no further allowance shall be made.*"

Also Section 2, subdivision (c), of the Act, above quoted (39 Statutes at Large 758):

> "For the purpose of ascertaining the gain derived from the sale or other disposition of property, real, personal, or mixed, *acquired before March* 1*st*, 1913, *the fair market price or value of such property as of March* 1*st*, 1913, *shall be the basis for determining the amount of such gain derived.*"

Nowhere in the statute as it then stood were the words "lessor" and "lessee" used. What the statute covered was the taxpayer and his income and his deductions from income. In the proper application of the law there never can arise a conflict between a lessor and lessee, for when the property was acquired before March 1, 1913, each deducts for depletion from his *gross income* simply the March 1st, 1913 value of *his interest*, through the fee or through his lease, in the product for the tax year in question, and the sum total of both deductions, of course, can never exceed the March 1st, 1913 value of the property, for that value is made up of the value of lessor's and lessee's interest therein where they owned those interests on March 1st, 1913.

We make the above statement at the outset because in previous briefs and arguments before the Department and in the courts below the Department has contended that to allow deduction for depletion to a *lessee* of a mine according to *his interest* would in some mysterious manner deprive the *lessor* of his deduction according to *his interest*. In fact, in the trial brief submitted in the District Court, the Department summed up its

argument upon this point at the end of its brief under the heading "Conclusion" as follows:

> "It is submitted that the plaintiff, a lessee of mining property, is not entitled to claim a deduction for depletion, *as against the fee owner*, under the provisions of Section 12 (a) of the Revenue Act of 1916."

Also, in the assignments of error made by the Department in the Circuit Court of Appeals we find the following under the Fourth assignment of error:

> "and that the statutory deduction for depletion cannot be credited twice—once to the fee owners and again to the lessee; that such a deduction for depletion belonged of right to the fee owners and the Alworth-Stephens Company was not entitled to the deduction for depletion."

The arguments of the Department evidently misled the Circuit Court of Appeals of the Sixth Circuit in the case of *Weiss vs. Mohawk Mining Company*, 264 Fed. 502, hereinafter more fully discussed, because the last sentence of the decision of that court on re-argument was:

> "that the statutory reduction for 'depletion' cannot be twice credited, once to the fee owner, and once to the lessee; and that the exemption belongs of right to the fee owner."

This position taken by the Department is a fundamental error. It must necessarily be erroneous to argue that allowing depletion to a lessor according to his interest and to a lessee according to his interest would result in crediting the same depletion twice. This position is *absolutely unsound*, because allowing depletion to the fee owner *according to his interest* in

the property in no manner conflicts with the allowance of depletion to the lessee *according to his interest* in the property, nor does so doing result in crediting the same depletion allowance twice, for the simple reason that the depletion allowances *are not the same.* It is true that as to property acquired before March 1, 1913, the sum of the two depletion allowances should not and in practice could not exceed the March 1st, 1913 value of the property.

On analysis, the matter would seem to be as plain as the fact that 2 and 2 make 4. For the statute in terms makes a reasonable allowance for depletion, but provides that no further allowance shall be made when the allowances shall have equalled, in the case of a purchase made prior to March 1st, 1913, the fair market value as of that date. Now, if a fee owning lessor were alone concerned and it were found that his March 1st, 1913 value equalled 4, then the Department would allow him reasonable depletion until the figure 4 was reached. But, the Department says, if on the other hand it be found that on March 1st, 1913, the value of the fee owner's interest in the same property was equal to 2 and the value of the lessee's interest in the property through his leasehold is equal to 2, then we will allow the fee owner a deduction up to the extent of 2 only, but we will allow the lessee, who owns the other interest in the property, no deduction whatsoever.

Our contention is simply that where the value of the ownership is divided equally through the fee and a lease, then the lessor is entitled to depletion up to the extent of 2 and the lessee is entitled to depletion up to the extent of 2, and the sum total is 4, which is exactly the same depletion the Department would have allowed the fee owner in case there had been no lease, or in case the rate of royalty under the lease was so high that the lessee's interest in the lease was of no value.

As a matter of fact, there is absolutely no conflict between a lessor and a lessee as to their respective deductions. They are both entitled to deductions for depletion according to the

March 1st, 1913 value of their respective interests in the property, and no more and no less—the lessor according to the value of his interest as modified and lessened by the lease which he has granted, and the lessee according to the value of his lease, which, in the present case, was even greater than the value of the fee interest, because in the present case the fee owner would never receive more than 30c per ton royalty, while the Alworth-Stephens Company, lessee from the fee owner and sub-lessor to the operating companies, would receive net on one mine 30c per ton and on the other 45c per ton.

It was certain, as found by the court, that the ore would all be taken out by the operating companies within seven years from March 1st, 1913, and it was so taken. It follows as the night the day that the sum total of the two deductions for depletion could not equal more than the March 1st, 1913 value of the mine. The Alworth-Stephens Sompany as lessee and sub-lessor could never take depletion to a greater extent than the March 1st, 1913 value of its leasehold property interest. The fee owner could never take depletion to a greater extent than the March 1st, 1913 value of the fee owner's interest in the property as that value was modified and limited by the lease which had been granted to the Alworth-Stephens Company.

The Department has always admitted and claimed that a fee owing lessor was entitled to his deduction according to his interest *as modified by the lessee's interest*, but denies the right to any deduction in 1917 for depletion for a lessee. Yet they are both owners of property interests in the mine and both are taxpayers under the law, and the law in force in 1917 never used the words "lessor" or "lessee" at all, and spoke only of the deductions to which a taxpayer was entitled from the *gross amount* of his income in arriving at his *net taxable income*. Neither does the law in force in 1917 make any distinction as to the character of the property right or estate owned by the taxpayer and exhausted because of its employment in business.

Judge Sanborn noted carefully the language of the statute. Before construing it, he said: (Record page 199)

> "When one first reads this provision, no doubt or uncertainty as to the parties to whom it authorizes these allowances for depletion to be made occurs to the ordinary mind. The suggestion does not arise that this is a grant to the owners of the fee titles to mines or that lessees and all others having property interests in them are excepted from the grant."

In construing the statute, he said:

> "The plain, clear and reasonable meaning of the statute seems to be that the reasonable allowance for depletion in case of a mine is to be made to everyone whose property right and interest therein has been depleted by the extraction and disposition of the product thereof which has been mined and sold during the year for which the return and computation are made."

Shortly after the passage of the act here in question, the Revenue Department issued a document known as Form A-M-MS, entitled "Schedule for Depletion, 1909 to 1917", and in this document says:

> "Lessor. Under the Act of 1909 a lessor is entitled to no deduction for depletion. Under the Act of 1913 and under the Act of 1916 a lessor is permitted a depletion allowance, which is computed like that of an operating owner, except that where a mine was leased before March 1, 1913, the allowance for depletion in favor of the lessor is based, not on the fair market value of the ore or material in place as of March 1, 1913, *but on the lessor's interest therein on that date.*"

The same document says:

> "Lessees. As mining leases are held not to convey the mineral deposits in place but only the privilege of entering upon the premises and mining and removing such deposits, *under none of the Acts of* 1909, 1913 *or* 1916 *is a lessee entitled to deduction from income on account of depletion.*"

By this ruling the Department arbitrarily, without any justice or equity or valid reason at all, attempted so to construe the 1916 law as not only to limit the lessor's right to depletion to *his interest in the property as of March* 1*st*, 1913, *but also to deprive the lessee of any right to depletion at all.* In other words the lessor was held to be entitled to relief according to *his interest in the property as modified by the interest of the lessee,* but the lessee was allowed no right of depletion, even though the lessor's right thereto had been modified and limited because of the lessee's interest.

A lessee has a vested property interest and right in the mine covered by its lease.

Practically all of the mines in Minnesota, from which comes upwards of 50% of all the iron ore used in the United States, are operated under leases. The largest mines are stripped of the overburden by the lessees. There are several of the largest mines in Minnesota which had been entirely stripped of overburden prior to March 1, 1913 by the lessees, and where the leasehold interest on that date had at lease five times the market value of the interest of the lessors in the property on the same date.

Judge Sanborn says:

> "It is common knowledge that in the case of mines

> the property rights and interests therein and the incomes derived therefrom by lessees and others than those who own the titles to the mines are much more valuable than the rights and interests of such owners." (Record page 200).

Mining leases form the basis of industrial operations of great extent, involving the investment of large sums of money and the employment of thousands of men.

The mining leases owned by the Alworth-Stephens Company constituted on March 1, 1913 its property and its only property, which property was exhausted and rendered less valuable year by year by depletion through mining and sale of the iron ore in the mine. There can be absolutely no question that such mining leases grant an interest or estate in the property or that the lessee has a vested property interest and estate therein. Section 6652 of the Statutes of Minnesota of 1913 is as follows:

> "Estates in lands are divided into estates of inheritance, estates for life, estates for years, and estates at will and by sufferance."

In Section 5396, Minnesota Statutes of 1913, in the chapter on Eminent Domain, the legislature has defined the meaning of the word "owner" as follows:

> "and the word 'owner' as so used shall extend to all persons interested in such property as proprietors, *tenants*, encumbrancers or otherwise."

Subdivision 9 of Section 9412 of the Statutes of Minnesota of 1913, giving definition of words used in the Minnesota statutes, reads:

"The words 'land', 'lands', 'realty', and 'real estate' shall include lands, tenements, and hereditaments, and all rights thereto and interests therein."

Section 7002 of the Minnesota Statutes of 1913 reads:

"No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the parties", etc.

Section 7003 of the Minnesota Statutes of 1913 reads:

"Every contract for the leasing for a longer period than one year or for the sale of any lands, or any interest in lands ,shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing and subscribed by the party by whom the lease or sale is to be made", etc.

Section 7035 of the Statutes reads:

"Whoever performs labor or furnishes any skill, material or machinery in or about the opening or working of any mine, at the request of the owner thereof or of the lessee of such owner, or of any contractor of either, shall have a lien for the value thereof *upon the interest of such owner or lessee, as the case may be, in said mine* and its appurtenances, which lien may be asserted and enforced as in this chapter prescribed in respect *to other liens upon real estate.*"

In *Olson vs. Oneida Mines Co.*, 153 Minn. 80, the Minnesota court held that this statute confined liens for services and material furnished *a lessee* in opening and operating a mine *to the interest of the lessee therein*, clearly recognizing the property interest of a lessee in such mine.

In *In re Emerson's Homestead*, 58 Minn. 450, the Supreme Court held, in line with former decisions, that a person was entitled to a homestead in a ten-year lease, and this in hotel property.

In *Minnesota Debenture Co. vs. Dean*, 85 Minn. 473, the

Minnesota court approves the definition by Bouvier of an estate as follows:

> "The quantity of interest which a person has,—from absolute ownership down to naked possession."

and holds that the word "estate" at common law is most comprehensive and that it has not been limited in use in Minnesota, either by courts or legislative enactment.

Leasehold estates have been recognized by innumerable court decisions which it is unnecessary here to cite, except that it may be worth while to note the decision of the Circuit Court of Appeals for the Eighth Circuit in *Ewart v. Robinson*, 289 Fed. 740, where the lessee under an oil lease brought ejectment to secure possession of the leased premises. This case involved directly the character of the estate granted by the lease. Judge Kenyon examined and reviewed the Minnesota cases dealing with mineral leases of iron ore land. He also reviewed the decisions of this court in the *Sargent Land Company* and *Biwabik* cases hereinafter referred to, and held that,—

> "While the lease did not amount to a conveyance of the oil or gas or mineral in the ground, it did amount to a conveyance of an interest in the land, and was not a mere license." (Page 750).

The court therefore affirmed judgment in favor of the plaintiff and held that the lessee was entitled to maintain an action of ejectment.

Judge Sanborn in the opinion in this case in the court below, says,—

> "The property rights of these lessees were as absolute, as indefeasible, as enforceable at law and in equity and more valuable than the property rights and interests of the owners of the titles to the mines, of the lessors of the plain-

tiff, which interests were limited by the terms of the leases." (Page 198).

It is of the utmost importance to note, to begin with, the broad general language contained in the Revenue Act of 1916, Section 12, subdivision second, as follows:

> "All losses actually sustained and charged off for the year and not compensated by insurance or otherwise, including a reasonable allowance for the *exhaustion*, wear and tear of property arising out of its use or employment in the business or trade."

This general provision clearly contemplates that deductions shall be made including a reasonable allowance for the exhaustion of all property which is used or employed in trade or business and is gradually consumed and exhausted by such use. The provision relating to mines (paragraph b) is one of the subdivisions of this general provision of the law.

The leaseholds here involved, covering the Perkins and Hudson Mines, not only represent property rights in the fullest sense, but in fact constituted the entire property which the Company owned on March 1, 1913, all of which was consumed and exhausted by the mining and sale of the ore.

At the Hudson Mine, the evidence shows conclusively that on March 1, 1913 the mine was stripped and ready for shipping, and was worth upwards of $1.00 per ton for all of the ore therein. (Rec. page 39). It was absolutely certain that the sublessee would mine out all of the ore within seven years. The fee owners of the Hudson Mine could never get more than 30c per ton in royalty therefrom. The Alworth-Stephens Company as lessee and sub-lessor would likewise net 30c per ton, as it had sub-leased at 60c per ton. Under the contention made by the Government, the fee owner would be entitled to claim de-

pletion on this thirty-cent property interest in this mine, while the Alworth-Stephens Company would be denied the right to take depletion on its thirty-cent interest therein, although both interests were of exactly equal market value on March 1, 1913.

When ore was mined and sold there occurred a depletion in the value of the respondent's property interest just as much as in the value of the fee holder's property interest.

In the case of the Perkins Mine, the property interest of the Alworth-Stephens Company therein was greater than that of the lessor, who is the fee owner, yet the construction contended for by the Government would grant to the lessor the right of depletion on his thirty-cent interest, but deny such right of depletion to the lessee on its forty-five cent interest, although both interests combined were less than the total value of the mine on March 1, 1913. On principle, therefore, it would clearly appear that the lessee is a smuch entitled to claim depletion as the lessor.

We had many interviews with heads of divisions in the Internal Revenue Department and officials, including Mr. Roper, (R. pages 86 and 173), and also had extensive correspondence with reference to this claim, and as we stated on the record (p. 86) we have yet to find a single individual who maintained there was any justice or equity in the ruling of the Department.

The Department adopted the foregoing quoted regulation discriminating between lessors and lessees of mines and in the early interpretation of the law adopted certain regulations against allowances to tax payers in other wasting industries and properties but has gradually modified the rules in these other cases.

Regulations 33 (Revised) Article 170, with reference to oil and gas properties, which regulations were based upon paragraph (a) of subdivision second of Section 12 of the law of 1916, likewise denied to lessees the right of depletion, except to the extent of the amount paid in cash for the lease. As pointed out by Judge Sanborn in his opinion (Rec. p. 201) and as herein-

after more fully set forth this regulation was abandoned on August 22, 1922 by Treasury Decision No. 3386, and a new regulation adopted permitting the lessee to take depletion on oil and gas properties on the basis of the fair market value of his interest as of March 1, 1913.

Under Regulations 33 (Revised) Article 174, it was expressly provided that no deduction should be made in the case of patents, except to the extent of the actual cost thereof. Under Regulations 45, Article 163, such deductions may now be made for all intangibles, examples of which as given in the Regulation, are "patents and copyrights, licenses and franchises."

Strong confirmation of the right of the taxpayer to make this deduction and of the justice of allowing the same is found in the opinion of the United States Board of Tax Appeals in the Appeal of Grosvenor Atterbury, decided December 11, 1924, (Docket No. 195).

This Appeal was taken from a determination by the Commissioner of a deficiency in the income taxes paid by the appellant for the years 1917 to 1920 inclusive. The appellant contended "that the Commissioner erred in holding that a lessee is not entitled under the Revenue Acts of 1916, 1917, 1918 and 1921, to an allowance for depreciation based on the value of his lease as of March 1, 1913, if acquired prior thereto.

The taxpayer on May 1, 1903, acquired for business purposes a leasehold on premises in New York City for the sum of $33,804.80, which then had a term of life of nineteen years. On March 1, 1913, the leasehold had a conceded value of $58,500.00. We quote from the opinion of the Board as follows:

> "The Commissioner contends that the depreciation claimed by the taxpayer is not a proper deduction within the meaning of Section 214 (a) (8) of the Revenue Act of 1918, or Section 214 (a) (8) of the Revenue Act of 1921. In making this contention, the Commissioner asserts that

he has consistently held that a lessee is not entitled to an allowance for depreciation based upon the value of a lease as of March 1, 1913, if acquired prior thereto, but, if a leasehold was acquired for business purposes, the purchaser has been allowed as a deduction in his income tax return an aliquot part of the purchase price each year, based on the number of years the lease has to run. This deduction has not been considered an exhaustion of property within the meaning of Section 214 (a) (8) of the Revenue Acts of 1918 and 1921, but has been allowed upon the theory that the amount paid for a lease constitutes advance rental and that, as such, it would ordinarily be a business expense, and could be deducted in annual installments over the period of life of the lease.

"The provisions of Section 5 (a) (7) of the Revenue Acts of 1916 and 1917 relating to allowance of deductions in computing net income are identical in language and read as follows:

> " 'A reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade.'

"Section 214 (a) (8) of the Revenue Act of 1918 was changed in language to read as follows:

> " 'A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence.'

"Section 214 (a) (8) of the Revenue Act of 1921 contains added language so that it reads:

> " 'A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of such property acquired before March 1, 1913, this deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913.'

"It should be noted that, in *all four* of the sections above cited, the acts provide for *deductions* to be *allowed* and not for depreciation. In the light of this language, the attempt of the Commissioner to distinguish between *deduction* and *depreciation* in making *allowances* on leaseholds seems to be without reason and illogical. The statutes do not use the word *depreciation*. The term *exhaus-*

tion, used in *all four* sections, properly describes the reduction in the remaining life of a leasehold as it approaches, year by year, its termination.

"It should also be noted that all four of the sections quoted use the word *property*, without limitation, restriction, or definition of that term. *A leasehold has been long recognized in law as property.* It answers all the requirements of the simple definition which describes property as "the exclusive right to possess, enjoy and dispose of a thing'. *Certainly a leasehold of the character here involved is one of the most important elements of property used in trade or business*, because without the right to occupy the business premises the taxpayer could conduct no business nor could he derive a gain from a sale thereof upon which a tax could be imposed. We, therefore, cannot escape the conclusion that the taxpayer is entitled to take a deduction for each of the years involved for *exhaustion* of his leasehold."

In this opinion the Board expressly quotes and construes the Revenue Acts of 1916 and 1917, as well as the later laws, and calls attention to the fact that the statutes use the term "exhaustion" rather than the word "depreciation" which is used by the Commissioner. It is expressly held that a leasehold is a *property interest*, that it not only may be employed in business but is one of the most important elements of property used in trade or business, and that the conclusion cannot be avoided that a taxpayer is entitled to take a deduction for the exhaustion of his leasehold.

In the early regulations the Department drew a distinction between a deduction based upon the amount actually paid for or invested in a lease and its fair market value March 1, 1913. Even in the case of mining leases, it was provided in Regulations 33 (Revised) Article 171, that a lessee could take a depletion deduction based upon the amount of capital invested in the lease, but the right of the lessee was limited to such deductions, although the lessor was permitted to base his deduction on the

fair market value of his interest. This limitation was a plain injustice against the lessee.

By the decisions above quoted the Board of Tax Appeals is now definitely committed to the proposition that a deduction must also be made for the exhaustion of the value of the leasehold as of March 1, 1913. The action of the Department in thus step by step modifying and correcting the unjust and inequitable ruling made with reference to the holders of leases and similar rights under the laws of 1916 and 1917, constitutes of itself a strong and persuasive reason for the application of the same rule to mining leases.

With the single exception of the case of *Weiss v. Mohawk Mining Company*, 264 Fed. 502, which case, as we shall presently point out, really did not consider the questions decided by Judge Sanborn in the court below, and was evidently influenced by what we believe to have been a misunderstanding of the effect of the decision of this court in the Biwabik case, there is no case opposed to our contention here.

PETITIONER'S BRIEF

Practically all of our brief, including the foregoing and what hereinafter follows from our heading of "The Decided Cases", was in type before the Department's brief was received, but we deem this a proper place to reply directly to certain contentions in the Department's brief.

The position is taken in the Department's brief that only the fee owner can have depletion, because he is technically the owner of the ore in place.

But the statute allows a reasonable deduction from gross income for the exhaustion of property, and then in express terms,

so far as our case is concerned, defines the property to which this deduction from gross income applies, as follows:

> "(b) In the case of *mines* a reasonable allowance for depletion *thereof*, not to exceed the market value in the mine of the product thereof which has been mined and sold during the year."

Thus, by the express provision of the law, the "mine" is the property on account of which the deduction from gross income is made. The deduction from gross income is measured by the market value in the mine of the product mined and sold during the year, and is allowed to the taxpayer who has the gross income derived from the depletion of the mine through the mining and sale of its product, and who thereby actually sustains the diminution in the value of his property interest by the mining and selling of the product.

The lessees interest in the mine constitutes property of the highest character. It is commonly bought and sold, may be mortgaged for the security of money, may be levied upon and taken by process of law, and passes by inheritance, and is a property interest and estate as clearly recognized under the law as the fee interest.

The contention of the Department that only a fee owner can have an allowance for depletion because he is technically the owner of the ore in place, ignores the fact that the lessee owns a valuable property interest and estate in the mine, which is the property on account of which the allowance is made; that his ownership represents a property right and interest in the ore, which is a part of the mine, even though that property interest is not the technical legal title; that the mining and sale of this product of the mine depletes the value of the mine as a whole and the value of the leasehold property interest in exactly the same way as it depletes the value of the

fee interest; that the statute permits allowances for depletion by mining and sale of the product up to the total March 1st, 1913, market value; that to accord to the taxpayer the total March 1st, 1913, value as an allowance, which the statute expressly grants, *it is necessary to add together the value of the property interests of both the lessor and the lessee in the mine as of that date;* that the statute makes no exclusion of this full March 1st, 1913, value of the property, nor does it make any exclusion of any taxpayer from obtaining his part of such allowance, for the statute says, "the fair market price or value of such property as of March 1st, 1913, shall be the basis for determining the amount of such gain derived", and that when the allowance shall equal "the fair market value as of that date, no further allowance shall be made"; that the statute is presumed to treat all taxpayers alike who actually sustain a depletion of a March 1st, 1913, property value; and that, as pointed out by Judge Sanborn in the absence of an express exclusion of some taxpayer or interest, it must be presumed that the statute covered all those whose property interest in the mine are so affected, and certainly, as the mine is gradually depleted and exhausted by mining and selling the ore, the property interest of all who have rights and estates therein are proportionately exhausted and depleted and they are proportionately entitled to an allowance therefor from the gross receipts which arise out thereof. (Page 199).

This contention of the Department ignores the decisions of this court, such as *Stratton's Independence, Von Baumbach vs. Sargent Land Company,* and other cases, to the effect that the mine is the property which is exhausted through the mining and sale of the ore and on account of which the allowance is made. It is not the physical ore which the statute says shall be deducted from the gross income, but an allowance not exceeding the market value thereof, which is to be deducted from the gross income, and that gross income is created and comes into existence by reason of the very fact that the value of the mine is depleted by the mining and sale

of the very substance of the property. The Department's entire argument is built on a fundamental error that the allowance is limited to the technical legal owner of the ore in place. The law nowhere so states. On the contrary, the right is given to every taxpayer who actually sustains a loss by the depletion and exhaustion of his property interest in the mine, and is not confined to the owner of any particular property interest therein.

To illustrate, suppose there is a chattel mortgage under which the technical legal title to the chattel is in the mortgagee, and that this chattel constitutes his only security, as the mortgagor is not financially responsible, and that the amount of the loan secured is exactly one-half the value of the chattel. Then suppose that the chattel is absolutely destroyed. Would the Department say that the mortgagee, because he had the technical legal title, was the only one who could deduct any loss from his gross income, or could not the mortgagor also deduct from his gross income the value of his property interest and right in the destroyed property? Does the statute say anything about technical legal title? As Judge Sanborn points out, the allowance to the taxpayer who sustains a diminution in the value of his property interest should be as broad as the statute which requires the taxpayer to pay an income tax, and as this Court has pointed out in *Gould vs. Gould*, 245 U. S. 151, and other cases, a taxing statute will be construed in favor of the taxpayer and will not, by implication, be so construed as to require the payment of a tax unless its terms expressly so require.

The Department says the word "depletion" refers to "the emptying of something physical". Suppose it does. It is not the physical ore which is allowed or depleted from income, but "a reasonable allowance for depletion thereof (that is, the mine), not to exceed the market value in the mine of the product thereof" that is deducted from gross income. Every time a mine is depleted by the physical removal of a ton of ore the value of the fee owner's interest and of the lessee's interest therein is proportionately lessened or depleted. The lessee does not, as the De-

partment contends, claim any allowance because of the depletion of the fee owner's property right, but solely and only because of the depletion of his own property interest and estate in the mine. Both interests go to make up the total property interest which the statute allows to be depleted. It requires both interests to total the full March 1st, 1913, value of the mine, assuming, of course, that the royalty is low enough, as it was proved in this case to be, so that the lessee's property interest had a real, substantial value as of that date. Where both interests in the mine as of that date had an actual value, to make a proportionate allowance for depletion according to the respective proportionate values in the whole mine is not in one case more than in the other making an allowance for using up another's property interest and right. The royalties received by the fee owner in 1917, constituting his income from the mine, in part represented the March 1st, 1913, value of his interest in the mine. The royalties or return received by the lessee in 1917, which constituted his income, in part represented the March 1st, 1913, value of his interest in the mine. In the case of both the part representing the March 1st, 1913, value of the respective interests in the mine is the "allowance for depletion thereof" which the statute grants the taxpayer. From their respective gross incomes from the mine, the statute entitles each to his reasonable allowance for depletion, to find his net taxable income.

The Department says that by the removal of the ore there was a loss to the fee owner but a gain to the lessee, and that "the lessee has neither more nor less ore by working the lease". Passing the inconsistency of these statements, the fee owner and the lessee each had a thirty cents per ton property interest in the Hudson Mine, each of which, on March 1st, 1913, let us assume, was worth $100,000. The ore was all mined out before 1919 and the leases surrendered because of no more value. The fee owner still had the technical legal title to the land, which was of no value, and the lessee had nothing. Each had lost, by mining and removal of the product, the March 1st, 1913, value of his in-

terest in the mine, which was the depletion contemplated by the statute. That March 1st, 1913, value had been converted into cash as to each, in exactly the same amount and at exactly the same time, and in exactly the same way, and when the physical mining was completed there was nothing of value left to either, except that the fee owner continued to have the technical legal no-value title to the mined-out land. How, then, can it be said, as the Department contends, that the lessee had gained and the fee owner lost? Things equal to the same thing are equal to each other.

Certainly the operators of mines in Minnesota, who have expended millions of dollars in development, in sole reliance upon their property rights, to produce ore from these properties, would be surprised to learn that as ore is mined and removed from these properties there has been no lessening or exhaustion of their interest in these properties, or of their values, and would be quite gratified if they could convince themselves that the Department's statement is true, that they had just as much after the ore was gone as they had before. It is, of course, not true, as the Department suggests ,that ownership in the mine is confined to the technical legal title, but the fact is that the two estates of lessor and lessee, taken together, represent the entire ownership in the property. Judge Sanborn, with his long experience and knowledge of mining matters, fully appreciated the relation of lessor and lessee, and justly overruled the inaccurate and technical claims made by the Department.

The Department also claims that the fact that the Revenue Act of 1918 added an additional sentence, as follows: "In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee", indicates that Congress did not consider that mining lessees had the right to take depletion under the previous laws. The sentence added in the 1918 act does not purport to create any new right. This paragraph in the law contains on its face conclusive evidence of the purpose of Congress to provide for the apportionment of an

existing right or remedy. Plainly, unless the lessee had a property interest in the mine, he could have no right under either the Law of 1916 or the Law of 1918 to an allowance for depletion. This vested right existed in 1917 in exactly the same way that it existed under the law of 1918, and was affected in precisely the same manner by mining operations.

The Department refers to a report of the Committee on Ways and Means, submitting the Revenue Act of 1918, to the effect that the new law corrected an inequality of the then present law, by providing for an equitable apportionment of the depletion allowance between lessor and lessee. We have examined the Congressional Record and find that this is the only reference to this clause that appears in any report made on this measure, and that there was absolutely no discussion of this clause on the floor of the House or Senate. The complete explanation of this reference is found, however, in what occurred at the meetings conducted by the Committee on Ways and Means in June, 1918. Representatives of taxpayers interested in mining and in the production of oil appeared before the Committee and claimed that as the law stood in 1917 it was broad enought to cover an allowance to lessees as well as to fee owners, but that in view of the mis-construction which had been placed upon the law by the Treasury Department, the new Revenue Act should be clarified, so as not to leave any question about the right of mining lessees to their share in a reasonable allowance for depletion. See statements filed and testimony taken, as appears on pages 523 to 538, page 545, and pages 916 to 918 of the Special Volume of Reports on the Hearings on the Revenue Act of 1918 before the Ways and Means Committee. Those so appearing therefore proposed the language which was finally adopted in the Revenue Act of 1918, and which is plainly declaratory of the rights of lessees as they existed under the law in force in 1917. There would have been no occasion to propose this addition if it had not been for the misconstruction which the Department had placed upon this law, and this was then stated to the Committee. This clause was therefore merely intended to set at rest any possible misinter-

pretation by the Department of the law, rather than to correct any actual inequality if properly interpreted, and it was undoubtedly assumed during these discussions that the addition of this clause would be considered by the Department a construction of the meaning of the prior act, and that the Department would reverse its previous holdings, as it finally did in August, 1922, as to oil and gas leases and as it probably would have done at the same time or earlier as to mining lessees, had it not then been for the decision in *Mohawk Mining Company vs. Weiss*, hereinafter more fully considered.

The fact that the Department in its brief makes only slight reference to the opinion of Judge Sanborn in this case, and makes no attempt directly to answer his reasoning, is especially significant in view of the extremely narrow and technical construction which the Department places upon the law and the rights of a mining lessee.

On the question here for decision, the illustrations of the Department as to a contract existing on March 1st, 1913, for mining or shipping ore, are not in point or analagous. Such contracts would be simply personal contracts, which would give the contractor no kind of property interest in the mine.

But a leasehold does give the lessee a vested property interest, estate and right in the mining property, which, as above pointed out, Judge Sanborn says was "as absolute, as indefeasible, as enforcible at law and in equity, and more valuable than the property rights and interests of the owners of the titles to the mines, of the lessors of the plaintiff, which interests were limited by the terms of the leases." Therefore, it may be true that under the particular statute here in qestion, involving an allowance for depletion, a contractor who had a mere personal mining or hauling contract would not be entitled to an allowance for depletion as such. But we need not here consider whether, if such a contractor had such a contract, of a well-known, established value as of March 1st, 1913, he might be entitled to de-

duction from his gross income as such March 1st, 1913, value was consumed, either under this statute or under some other, or on some theory. It would seem, however, that the Department has and does allow deductions under most such circumstances, for, as pointed out elsewhere in this brief, it allows deduction on account of the March 1st, 1913, value of valuable advertising contracts, for the value of intangible property, on account of patents, copyrights, licenses and franchises, on account of good will, and, under the above mentioned ruling of the Committee on Appeals and Review, handed down December 8th, 1924, a long-time leasehold which had a well-defined March 1st, 1913 value, but which did not, as does a mining lease, involve the actual consumption and sale and disposal of the very substance constituting the value of the real estate, as does the sale of the ore in a mine. In fact the Department, in all cases of ascertainable March 1st, 1913 values which taxpayers have, allows a deduction, so far as we are aware, *except only in the single case of a lessee of a mine.*

The Department's brief says that the statute contemplates a deduction shall be allowed only in the case of a purchase prior to March 1st, 1913, and that a purchase can only apply to a fee owner. The word "purchase" as used in this act is clearly intended to cover the acquisition of property by any lawful means whatsoever. As hereinbefore quoted, 39 Statutes at Large, 758, reads as follows:

> "(c) For the purpose of ascertaining the gain derived by a sale or other disposition of property, real, personal or mixed, *acquired* before March 1st, 1913, the fair market price or value of such property as of March 1st, 1913, shall be the basis for determining the amount of such gain derived."

It is under this section that the figuring is done, and unquestionably the word "purchase' 'in the depletion section was used in the same sense as the word "acquired' 'in this section—that

is, the acquisition of property by any lawful means whatever. If the narrow meaning of "bargain" and "sell" were to be given the statute, it would exclude any fee owner who had acquired his property by gift or inheritance prior to 1913. No such meaning or effect was ever intended or has been placed upon it by the Treasury Department.

This claim of the Department is conclusively disposed of by the definition given by this Court to the word "purchase" in *Waskey vs. Hammer*, 223 U. S. 85, where the question arose whether one who staked out a mining claim had purchased an interest in the land, and this Court said:

> "The term 'purchase' is inclusive of the various modes of acquiring title to given rights in public lands under the general laws regulating their disposal."

It was there held that acquisition was a purchase.

In *United States vs. Whipple Hardware Co.*, 191 Fed. 945, the court says:

> "The word 'purchase' must be taken in its legal sense, which includes all modes of acquisition except that of descent."

See also *Buchser vs. Morss*, 196 Fed. 577; *United States vs. Beaty*, 198 Fed. 284, at 286.

In the General Statutes of Minnesota of 1913, Section 6813 of the Chapter relating to conveyances of real estate, the word "purchase" is defined as follows:

> "The word 'purchase' as used in this chapter, shall embrace every person to whom any estate or interest in real estate is conveyed for a valuable consideration, and also ev-

ery assignee of a mortgage, lease or other conditional estate."

But in any event, the Alworth-Stephens Company did purchase its interest in the property as early as 1909, because the option for leases which it held were given for a valuable consideration (p. 103) and required the Alworth-Stephens Company to do certain exploratory work (p. 105), and the leases themselves (pp. 124 and 145) required the payment of taxes on the whole of the mines and performing many other obligations. Clearly this constituted a purchase of the interest of the Alworth-Stephens Company in the mines prior to March 1st, 1913, just as clearly as a fee owner would have purchased his interest if he took a deed of the premises, either clear of incumbrances or subject to leases.

THE DECIDED CASES

This Court has several times passed upon questions arising under the 1909 Law, which law did not in terms provide for depletion, as did the Acts of September 8th, 1916, and October 3rd, 1917. The leading cases passed upon by this Court as to the 1909 Law are:

Von Baumbach vs. Sargent Land Company, 242 U. S. 503;
United States vs. Biwabik Mining Co., 247 U. S. 116,
Stanton vs. Baltic Mining Co., 240 U. S. 103.

The *Sargent Land Company* case arose under the 1909 law. This was a case involving royalties received by the fee owners. It was held by the court that the royalties received were in the nature of rentals and that they constituted income to the *owner of the fee.* The court says:

"The decisive question in this case is whether the payments made as so-called royalties amount to income so as to bring such payments within the scope of the corporation tax act of 1909."

The court, having held that the royalties constituted income within the meaning of the law, also held that the law provided no deduction for depletion therefrom, and that therefore the whole amount of the royalties was taxable to the fee owner following the principle laid down in *Stratton's Independence vs. Howbert*, 231 U. S. 399. The decision was expressly limited to the 1909 law, which law, (Act of August 5, 1909, 36 Statutes 113), as seen in the quotation as to deductions hereinbefore set forth in this brief, did not contain any provision whatsoever for allowance for "depletion" and did not use the word and did not mention mines. The court based its decision upon the proposition that *depreciation* should be construed in the ordinary sense as growing out of the use or wear and tear of property, and that it did not cover "depletion" or the exhaustion of ore from property. Be it borne in mind that that decision related to royalties received by a *fee owner*. The court says:

"It may be admitted that a fair argument arises from equitable considerations that, owing to the nature of mining property, an allowance in assessing taxes upon income should be made for the removal of the ore deposits from time to time. *Congress recognized this fact in passing the income tax section* of the Tariff Act (Sec. II, 38 Stat. at L. 166, 167, chap. 16, Comp. Stat, 1913, sections 6319-6322), when it permitted 'a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business, not to exceed, in the case of mines, *five per centum of the gross value at the mine of the output for the year for which the computation is made*'; and in the Income Tax Law of September 8, 1916, a reasonable allowance is made in the cases of mines for depletion thereof '*not to exceed the market value in the mine of the product thereof which has been mined and sold during the*

year for which the return and computation are made.' These provisions were not in the Act of 1909, and as we have said, we think that Congress, in that act, used the term 'depreciation' in its ordinary and usual significance. We therefore reach the conclusion that no allowance can be made of the character contended for as an item of depreciation."

It will be observed that in the above case the court squarely bases its decision upon the proposition that the 1909 *Act of Congress made no express provision for deduction for depletion from income, but points out that the later acts, which were not involved in that case, had done so and so had taken care of the equitable considerations justifying such deductions.*

In the case of *United States vs. Biwabik Mining Company*, 247 U. S. 116, 62 L. Ed. 1017, this Court had before it the case of a lessee, as distinguished from a fee owner in the *Sargent Land Company* case. This case also arose under the 1909 law. This Court followed the *Sargent Land Company* case, *making absolutely no distinction between income or royalty received by a lessor and income or royalty or value belonging to a lessee*, but held that in both instances they were taxable under the 1909 law, simply because that law made no express allowance for the deduction of depletion from income.

In *Stanton vs. Baltic Mining Company*, 240 U. S. 103, 60 L. Ed. 546, this Court recognized the right to deduct five per cent of the gross value at the mine of the output for the year in question, *under the* 1913 *law*. Here the court recognized and held constitutional the law permitting a five per cent deduction of the value at the mouth of the mine *as depletion*, and held that the law was constitutional and valid, even though the depletion so allowed was not as much as might be allowed other companies in other lines of business. The court made no distinction between a lessor and a lessee. The 1913 law was the first one that used the words "allowance for depletion of ores".

The foregoing are the principal cases which have any bearing upon this question, decided by this Court. It will be noted from the foregoing that the following things are true:

(1) That the only cases in which this Court has held that there shall be no depletion or deduction on account of the removal of ore *are cases arising under the* 1909 *law*, and that in those cases it was so held because there was no express provision allowing the deduction, and that all returns from royalties or rentals were taxable as income, *but in those cases under the* 1909 *law the court makes absolutely no distinction between royalties and rentals received by a lessor and by a lessee.* In the *Sargent Land Company* case it held that all the royalties received by a lessor were income. In the *Biwabik* case it held that royalties or their equivalent, received by a lessee, were income. In both cases no deduction was allowed because the 1909 law provided for no deduction, but in the *Sargent Land Company* case the court pointed out that the 1913 and 1916 law had expressly provided for deductions for depletion.

(2) This Court has recognized, under the law of 1913, that a deduction of five per cent of the value of the output at the mouth of the mine is a proper deduction, because the law expressly provided for depletion to that extent, this holding being in the *Stanton vs. Baltic Mining Company* case, but it made no distinction as between lessor and lessee.

(3) This Court has therefore held in three leading cases: (a) that royalties of a fee owner are income and under the 1909 law he is entitled to no deduction, as in the *Sargent* case; (b) that a sub-lessor's royalties, or the equivalent value of his returns in mining, constitute income and he is entitled to no deduction under the 1909 law, as in the *Biwabik* case; (c) that under the 1913 law a taxpayer is entitled to a five per cent deduction for depletion, because the law expressly so provides, as in the *Stanton* case, but makes no distinction between a lessor and a lessee; and (d) this Court has pointed out, in the *Sargent* case, that Congress has changed the 1909 law by the Act of September 8th, 1916, in expressly allowing a deduction from income, by quoting the language of that law:

"in the case of mines, a reasonable allowance for depletion thereof, not to exceed the market value at the mine of the product thereof which has been mined and sold during the year for which the return and computation are made, such reasonable allowance to be made * * * in the case of purchase made prior to March 1, 1913, the fair market value as of that date * * *."

There is nothing in the 1916 act in force in 1917 which makes any distinction between the right of a fee owner or of an intermediate lessee to claim a deduction from gross income to the extent or value of his right or interest in the property as it existed March 1st, 1913. The exhaustion of the ore body *is a depletion* of his property right and interest in the mine, of his leasehold value, just as much as it is depletion of the fee owner's property right and interest in the property, proportionate to the March 1st, 1913 value of the respective property interests. Of course, if the lessee were paying so high a royalty that he had no March 1st, 1913 value in his lease, then he would be entitled to no deduction. It is only to the extent of whatever value he then may have, in the mine through his lease that he is entitled to claim a deduction. *There is absolutely no sound foundation for the department's contention that an intermediate lessee has no property interest or right in the mine.* The fact is, the property interest in the mines was acquired by the intermediate lessee years before the Act of Congress took effect and this property intrest and property value existed on the 1st of March, 1913, just as potently as did that of the fee owner.

This Court has made no distinction in its holdings between a fee owner and a lessee. In the case of both, under the 1909 law, it has held that the whole rental or royalties are taxable as income without deduction, *because* the law made no express provision for allowance for depletion. In the *Biwabik Mining Company* case the contention of the company was that the lessee was more entitled to deduction for depreciation than the fee owner, but the court decided that he was no more so entitled than

the fee owner, but it *did not hold* that he was less entitled than was the fee owner, but placed them both upon exactly the same basis. The lessor's right to allowance for depletion to the extent of his right and interest in the property is just as strong and no stronger than the lessee's right. They are both interested in the property. They must each figure the value of their interest as modified by the interest of the other. Each is entitled to allowance for depletion to the extent of the value of his interest as it existed on the 1st of March, 1913, and the sum of the two depletions do not and never could equal more than the total value of the mine on that date. The lessor, if he receives royalties in instalments, therefore, must pay the tax upon the total amount which he receives over the value of his interest as it existed on the 1st of March, 1913, and the lessee, likewise, if he receives royalties through a sub-lease, concededly must pay the tax on what he receives over the value of his property interest as it existed on March 1st, 1913.

WEISS vs. MOHAWK MINING COMPANY, 264 Fed. 502.

The single case relied upon by the Department in the argument in the court below was the above entitled case and this is the single case it relies on here. The decision of Judge Westenhaver in the District Court in that case was in favor of the Mining Company. We submit that the decision of the Circuit Court of Appeals in that case did not really consider the point for which we here contend. In the original opinion filed in that case the court seemed to base its decision on the theory that the nature of a lessee's interest in the mine was such as to preclude its claim for depletion. Any such claim is fully answered by the opinion of Judge Sanborn and by our argument herein. In the opinion on reargument the court seems to base its decision on the ground that there was a conflict between lessor and lessee as to which should have depletion and that the exemption for deple-

tion belonged to the fee owner because it was assumed only one of them could have an allowance. In the decision filed on the petition for rehearing, the court says:

> "We think the substantial principles established by the decisions are that both the royalty received by the fee owner and the sums received by the operating lessee above the cost of operation are income; *that the statutory reduction for 'depletion' cannot be twice credited, once to the fee owner, and once to the lessee; and that the exemption belongs of right to the fee owner.*"

This quotation alone shows that the court never could have understood the proposition for which we here contend. We make absolutely no contention that the lessee *should* be allowed a depletion and that the lessor or fee owner *should not*. Under the statute they are both entitled to depletion according to their respective interests, both, however, not to exceed the value on March 1st, 1913.

Applied to the concrete facts of the present case and illustrating it by the Hudson Mine, the fee owner here had leased its property to the Alworth-Stephens Company at 30c per ton royalty. The Alworth-Stephens Company had sub-leased the same property for 60c per ton royalty, 30c of which it had to pay to the fee owner. The property would be mined out inside of seven years, so that the fee owner had a property interest in this mine of exactly the same value on March 1st, 1913, as the Alworth-Stephens Company. Therefore, on the basis of the finding of the lower court, the fee owner is entitled to allowance for depletion to the extent of 71.9% of the 30c per ton, equal to 21.57c per ton, and the lessee was entitled to the same depletion. The sum of the two depletions would therefore be approximately 43c per ton, while the evidence shows that the March 1st, 1913 value, as well, of course, as the 1917 value, was upwards of $1.00 per ton (Record pp. 39, 40).

Applied to the Perkins Mine, the fee owner had leased at 30c per ton. On this mine too he would be entitled to a deduction of 71.9% on every dollar that he received in royalties, or 21.57c per ton. The Alworth-Stephens Company had sub-leased at 75c per ton, leaving a net royalty to it of 45c per ton. It would on this mine also be entitled to a deduction of 71.9c on every dollar in royalties that it received. As its royalty was 45c per ton, it would be entitled to a deduction of 32.355c per ton as the March 1st, 1913 value of its property interest in the mine. The sum of the fee owner's and lessee's deductions would be about 54c per ton. On this mine also the value in 1917, as well as in 1913, stripped as the mine was, was upwards of $1.00 per ton. (Record pp. 50 and 51).

The depletion which is given the Alworth-Stephens Company by this judgment in no manner conflicts with any possible depletion allowance that could be claimed by the fee owners of these two properties who had only an interest represented by 30c per ton royalties, which was the most they could receive, and even if the Government should allow them the whole 30c per ton as the March 1st, 1913 value (which, of course, the Government would not do), still there was more than ample value left to grant the Alworth-Stephens Company all the depletion allowance given by this judgment, for on the Hudson Mine the depletion allowed by the judgment was 21.57 per ton and on the Perkins property 32.355c per ton, while the March 1st, 1913 value was found by the court to be upwards of 75c per ton (Record p. 26). The Alworth-Stephens net total royalties for 1917 were $77,505.98, and the depletion allowed was $55,726.88, which, as shown by Exhibit A attached to the findings of the court (Record p. 29), was exactly the March 1st, 1913 value of our leasehold interest on a per ton basis. Judge Sanborn says, in the opinion below:

> "The allowance in this case has been sedulously limited to the market value as of March 1, 1913, of the *individ-*

ual property right and interest of the plaintiff in the two mines." (Record page 202).

The court, in the *Weiss* case, therefore, did not at all appreciate our contention, inasmuch as it considered that a depletion could be allowed to only one of the parties interested in the property and as allowing to one would exclude the other, it therefore concluded that the fee owner only, could have a depletion allowance. If the fee owner in our case, instead of leasing to us, had leased direct to our sub-lessees, the Hudson at 60c per ton and the Perkins at 75c per ton, then even the Department does not claim but that the lessor alone would have been entitled to depletion on both of these properties, to the full extent above pointed out that we claim both the lessor and ourselves as sublessor would be entitled to deplete. Can it make any difference to the government or to the rights of the parties that the ownership of the property has been divided, by reason of the intermediate lease to the Alworth-Stephens Company? Under the Government's contention, if there had been no intermediate lessee it would have allowed a deduction to the lessor alone on the Hudson property to the extent of *twice* 21.57c per ton, or a total of 43.14c per ton, and it would have allowed on the Perkins property a deduction to the extent of 71.9% of 75c or 53.925c per ton, which is the sum total of the deductions that both lessor and lessee are entitled to under the above illustration. The Department takes the wholly untenable position that where there is a lessor and an intermediate lessee, the lessor is entitled to depletion *only to the extent of his interest as modified by the interest of the lessee,* but that the lessee cannot have depletion at all and that therefore the Government will collect, as applied to the present case, more than twice as much tax, because of the intervention of an intermediate lessee, than it would had there had been no such divided ownership.

Furthermore, the decision in the *Weiss* case seems to have been based simply upon the proposition that because *under the*

1909*Law* this Court decided in the *Biwabik* case that a lessee was not entitled to claim its capital assets had been diminished by the removal of ore, therefore depletion could not be claimed. The court seems to have overlooked the fact that this court, in the *Sargent Land Company* case, had held exactly the same thing as to a fee owner, to-wit: that he could not claim that by the removal of ore his capital assets had been diminished. That court seems entirely to have overlooked the contention which we here make, that both these decisions, as to a fee owner and as to a lessee, were made under the 1909 law, and that in both of these cases this Court held that royalties received or their equivalent were income as to each and as the statute had made no provision for depletion allowance no deduction on that account could be claimed. In the case now before the court, however, the 1916 law did make an express provision for depletion and did not, in terms or otherwise, limit it to a lessor. It simply provided that the taxpayer might deduct from his *gross income* a certain amount for depletion in arriving at his *net taxable income*. Not the slightest distinction was made between a lessor and a lessee.

It is only necessary here that this court apply the statutory provisions of the 1916 law which it cited in the above quoted decision in the *Sargent* case and which it there stated were absent from the 1909 law which it was there construing.

It may seem from the reasoning in the *Weiss* case that the court reached its conclusion because it considered that within the Supreme Court decisions a taxpayer could not deduct as for a return of capital assets, therefore he could take no allowance at all. The error of this reasoning is in assuming that the subject of capital assets has anything to do with the question. We admit that, under the decisions, royalties received by a lessee, as well as those received by a lessor, are not capital assets, but that they are income. But we assert that the 1916 law expressly permits deduction for depletion of the March 1st, 1913 value of the taxpayer's interest in the mine which is included in and rep-

resented by those royalties *from the gross amount of the income* before arriving at the *net taxable income*. The decision in the *Biwabik* case, which the court in the *Weiss* case seemed to think was binding upon it, made absolutely no distinction between a lessor and a lessee as to what was income. The decision in the *Weiss* case, without any foundation or justification, assumes that the Supreme Court in the *Biwabik* case made such a distinction, when in fact it did no such thing.

As Judge Sanborn well points out in the opinion below, the Circuit Court of the Sixth Circuit in the *Weiss* case seemed to find difficulty in allowing depletion, because it considered that "depletion" in the 1916 Act was not different from "depreciation" under the 1909 Act, and as to this Judge Sanborn says:

> "But if there were no substantial distinction as applied to a mine between that depreciation or allowance for capital assets consumed which was sought by mine owners under the earlier acts, and that depletion which was expressly allowed by the acts of 1916, there remains, nevertheless, this distinction and difference between the right to the allowance sought under the earlier acts and the right to the allowance sought in this case and in the Weiss case. Under the earlier acts the right to the allowance sought *was not expressly granted by Congress; under the act of* 1916, *the right to the allowance sought is expressly granted. The difference is great.*" (Record page203).

The 1909 Act, which was considered in the *Biwabik* case, by which case the court in the Sixth Circuit considered itself bound, did not use the word "depletion" at all and did not, in the section in question, refer to "mines" at all, while the 1916 Act did use the word "depletion" and did in that connection expressly refer to "mines", as this court so well pointed out in the *Sargent* case.

There is not the slightest thing in the language of the Act of Congress itself which authorizes an allowance for depletion

in favor of a lessor any more than in favor of a lessee. They are both owners of rights in the property—the original lessor of the fee, limited and reduced by the lease—the lessee of the lease, which is the value which the fee owner has parted with and conveyed away. They both have an estate in the property. There is nothing in the language of the statute which justifies a distinction based upon the technical legal title to the ore in place. The act is dealing with the taxpayer's taxable income. In the *Weiss* case the court seemed to think that it was governed by the *Biwabik* case because in that case it was held that no deduction under the 1909 law was allowable from royalty income as a capital asset of a lessee. But how can the right to an allowance be made to depend upon that fact and the allowance for depletion of ores be given to a fee owner when no deduction was allowable from royalty income as a capital asset of the fee owner, as it was determined in the *Sargent* case? The change from the 1909 law was made because of the injustice which that law had created, but there is no ground for the supposition that Congress was influenced by the claims of fee owners and not equally by the claims of lessees. It must be believed that Congress, as nearly as possible, intended to put all taxpayers on an equality with reference to their property interests and deductions.

The writ of ceriorari in the *Weiss* or *Mohawk* case was denied by this Court (254 U. S. 637). On what ground does not appear, as no opinion was filed, but we are morally certain that it was because it could not have been clear to this Court that there was anything else involved than whether the Mohawk Mining Company was entitled to a deduction on account of capital assets, and the real question now before this Court, namely, whether the statute by its express language entitled a lessee as well as a lessor to depletion really was not deemed presented. The Department brief says the petition for a writ of certiorari was denied and "The Mohawk case was therefore considered on its merits by this Court." This

is directly contrary to the holding of this court which is that the denial of such a petition is in no sense a passing upon the merits as held in *Hamilton vs. Wolf*, 240 U. S. 251.

The statute itself does not justify and there is no decision of this Court which justifies any distinction between the right of a lessor and a lessee to claim depletion. The only distinction which has been made is the arbitrary, unjust and impractical ruling of the Internal Revenue Department. The former Commissioner of Internal Revenue, his Chief Assistant, and the Solicitor of the Department have all acknowledged to the writer of this brief that this ruling was inequitable and unjust and ought to be modified, (see Record pages 86 and 173 to 175). If it were simply a question whether royalties constitute capital assets or not, we concede that this Court has decided that they do not, but this Court has recognized, in the *Sargent* case, that the taxpayer under the 1916 law is entitled to a deduction *from gross income* of his 1913 property value, represented by his right to receive royalties. But it has not decided that a lessee is less entitled to the depletion expressly given by statute than the lessor. Every consideration of common sense and justice requires that they be equally allowed a depletion, according to their respective interests, each as modified by the interests of the other. It would be difficult to find a more unjust and unreasonable construction of any law than the Department adopted here. We cannot conceive how such a ruling can exist, except on the theory that it was made when the law was new, when the Department officers were uncertain as to its meaning in many particulars, when war conditions prevailed and everything was in a jumble, and the officers felt it to be the safer course to resolve every question of construction in favor of the Government, so as to derive as much tax as possible and to absolve themselves from possible criticism in making any construction which by any possibility later might be thought to be too favorable to the tax payer. The continuance of such construction can only be accounted for because someone originally made it and no one

since, in the Department, has, in common parlance, "had the nerve" to overrule or modify it.

The Department contends that under the decisions the relations between a fee owner and a lessee are to be worked out on the principle of landlord and tenant. This we do not and never have disputed. It was undoubtedly because of this fact that this Court, in the *Sargent Land Company* case, held that all royalties, even in the hands of a fee owner, were income, but it does not at all follow from this fact that a lessee is less entitled to take the statutory deduction allowance for depletion than is a fee owner. The only substantial value of an iron ore property is the ore in it. When that ore is gone, its value is gone. Where the value of the fee owner's and the lessee's interest in the property is unquestionably the same as of March 1st, 1913, as in the case of the Hudson Mine, can any reason be suggested why the removal of a ton of ore does not deplete the lessee's interest as well as that of the fee owner? Depletion means simply exhaustion or emptying out. And where the value of the fee owner's and lessee's interest was equal on March 1st, 1913, every time a ton of ore is mined the lessee's interest or value was exhausted, or emptied out, or depleted, exactly in the same way as that of the fee owner.

Nearly all iron ore mines in Minnesota are operated under leases. These leases, many of them taken in the early days and the properties stripped by lessees, were on March 1st, 1913 worth several times the value of the fee. Leases, as in the present case, usually run for fifty years, and sometimes for much longer, some as long as ninety-nine years.

It is wholly immaterial whether the Alworth-Stephens Company was or was not technically the owner of the ore in place. It owned the leaseholds on these mines, which were, as the court finds property interests (page 26) and more valuable than the fee. When the ore was mined out, the value of its leasehold property interest was exhausted or emptied out or depleted, exactly in the same way as that of the fee owner and, as it happens

in this particular instance, to an even larger extent in dollars and cents than the value of the fee interests.

If the Alworth-Stephens Company on or after March 1st, 1913, had purchased its lease from someone else, paying therefor in cash 71.9% of the net royalties that were to be received from the sub-lessees under it, even the Department would have allowed it depletion as the ore was mined, up to that amount. And yet the law expressly provided, "in the case of purchase made prior to March 1st, 1913, the fair market value as of that date" should be allowed as depletion. It certainly should make no difference to the Government and no difference in common sense whether the Alworth-Stephens Company owned a lease of a certain value on March 1st, 1913, or on that date purchased and paid that amount for a lease. In either event it should be entitled to the allowance. And yet the Department would allow it to deplete or get back its value in case it had purchased on that date, but would deprive it of the same right if it had purchased a day or more prior thereto.

The Treasury Department has by its rulings recognized the right to a deduction because of exhaustion of intangible property through its use in business (Regulations 45, Art. 163, as modified by T. D. 2929, Regulations 62, Art. 163); also in the case of patents, copyrights, licenses and franchises (Regulations 62, Art. 167); also for the exhaustion of good will (Ruling No. 15-19-445, Adv. Bd. Rec. 44, 1 c. b. 133; Ruling No. 17-20-84, Off. Dec. 472); also for contract for advertising (Ruling No. 1-9-115, T. D. 122), also for the March 1, 1913 value of a lease of New York real estate as decided by the Committee on Appeals and Review December 8, 1924, as hereinbefore quoted, and generally recognizes the right to deduction of the March 1st, 1913 value which the taxpayer had *in all cases now, except in the case of a lessee of a mine.*

RECENT CHANGE IN DEPARTMENT'S RULING.

Under date of August 22, 1922, the Revenue Department over the signature of A. W. Mellon, Secretary of the Treasury, and D. H. Blair, Commisioner of Internal Revenue, completely reversed the previous holding of the Department with reference to oil leases as relating to this very question *and applying to* 1917.

By reference to the statute of September 8th, 1916, (hereinbefore quoted) which was in force so far as this point is concerned in 1917, as the act of October 3rd, 1917 did not modify it in this respect, it will be found that oil and gas leases are treated under the same section and same subdivision as mining leases. The statute to which we refer is found in 39 Statutes at Large, page 759, and provides, in Section 12 (a), as to a corporation, for deduction from the gross amount of its income as follows:

> "Second: All losses actually sustained and charged off within the year and not compensated by insurance or otherwise, including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade; (a) in the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; (b) in the case of mines, a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined or sold during the year for which the return and computation are made, such reasonable allowance to be made in case of both (a) and (b) under rules and regulations to be prescribed by the Secretary of the Treasury: Provided, that when the allowance authorized in (a) and (b) shall equal the capital originally invested, or in case of purchase made prior to March 1st, 1913, the fair market value as of that date, no further allowance shall be made."

It will therefore be seen that oil and gas wells are treated in exactly the same way, as to the taxpayer's interest therein, that mines are treated. The word "lessor" or "lessee" is not used with reference to oil or gas wells, any more than it is used with reference to mines.

Up until August 22, 1922, Article 170 of the Internal Revenue Department's Regulations 33 (Revised) was in force, parts of which section, in the language of the Regulations, stated that the taxpayer was entitled "to deduct from gross income—

> 'A reasonable allowance * * * for actual reduction in flow and production, * * * provided that when the allowance authorized * * * shall equal the capital originally invested, or in case of purchase made prior to March 1, 1913, the fair market value as of that date, no further allowance shall be made.'
>
> "The essence of this provision of law is that the owner or operator of this character of property shall secure through an aggregate of annual depletion deductions, the return of the amount of capital actually invested, or an amount not in excess of the fair market value as of March 1, 1913, of the properties owned prior to that date.
>
> "For the purpose of determining the amount of capital to be returned through annual deductions, operators may be divided into two classes, (a) operators who own the fee, and (b) operators who own a lease or leases.
>
> "In the case of the operating *fee owner*, the amount returnable *through depletion deductions is the fair market value o fthe property* (*exclusive of the cost of physical property*), *as of March* 1, 1913, *if acquired prior to that date*, or the actual cost of the property if acquired subsequent to that date, plus, in either case, the cost of development (other than the cost of physical property incident to such development) up to the point at which the income from the developed territory equals or exceeds the deductible expenses.
>
> *"In the case of a lessee, the capital thus to be returned is the amount paid in cash or its equivalent as a bonus or otherwise by the lessee for the lease, plus also expenses in-*

curred in developing the property (exclusive of physical property) prior to the receipt of income therefrom sufficient to meet all deductible expenses, after which time as to both owner and lessee, such incidental expenses as are paid for wages, fuel, repairs, hauling, etc., in connection with the drilling of wells and further development of the property, may, at the option of the operator, be deducted as an operating expense or charged to capital account."

By Treasury Decision No. 3386, under date of August 22, 1922, the Department issued a regulation entitled as follows:

"To collectors of internal revenue and others concerned:

"Article 170 of Regulations 33 (revised) is hereby amended to read as follows:

" 'Art. 170, Secs. 5 and 12 of the act of September 8, 1916 as amended by the act of October 3, 1917 authorizes, etc.' "

Here follows, without any substantial change and almost word for word, all of the above quoted part of the original regulation 170 until it comes to the last paragraph above quoted in italics, relating to a lessee, and in place of that paragraph Article 170 of the Regulations is now made to read as follows:

"In the case of a lessee, the capital thus to be returned *is the fair market value of the lessee's interest as of March* 1, 1913, *if acquired prior to that date*, or the amount paid in cash or its equivalent as a bonus or otherwise by the lessee for the lease if acquired on or after that date, plus, in either case, all expenses incurred in deevloping the property (exclusive of physical property) prior to the receipt of income therefrom sufficient to meet all deductible expenses, after which time, as to both owner and lessee, such incidental expenses as are paid for wages, fuel, repairs, hauling, etc., in connection with the drilling of wells and further development of the property, may, at the option of the operator, be

deducted as an operating expense or charged to capital account. *The value of the equities of lessor and lessee shall be computed separately, but when determined as of the same basic date, shall together never exceed the value at that date of the property in fee simple. By 'basic date' is meant March* 1, 1913, *in case o facquisition prior to that date, or the date of acquisition where it occurred on or after that date."*

By comparison of the section just quoted with the last section, relating to a lessee, of the regulations as they stood prior to August 22, 1922, it will be seen that the Department, as to leases of oil and gas properties, has now completely reversed itself as applying to 1917 on the very point now under consideration by this Court, as to mining properties. The regulations formerly provided, with reference to oil and gas properties, as to 1917, just as they did as to other mining properties, that a lessor was entitled to depletion according to his March 1, 1913 interest, but that *a lessee of oil and gas properties was entitled to no depletion* on account of the March 1, 1913 value of his lease interest but only to the extent he might have paid a bonus for the leases. The department has likewise always ruled as to 1917 that a mining lessee could deplete to the extent he had paid a bonus for his lease but has wholly deprived him of the right to deplete the March 1, 1913 value thereof except to the extent he had paid a bonus therefor. But it allowed a fee owner to deplete the March 1, 1913 value of his property, regardless of whether he had paid much or nothing for his interest. By this change in the regulations a lessee of oil and gas properties is now entitled to depletion according to his March 1, 1913 interest, in exactly the same way as a lessor. Evidently the Department, as to oil and gas properties, now finds no conflict between the interests of a lessor and a lessee, for it has very easily provided:

"The value of the equities of lessor and lessee shall be computed separately, but when determined as of the same

basic date, shall together never exceed the value at that date of the property in fee simple."

That is exactly what we have always contended for and what we contended for before the Department and before the court below, and this contention has now been recognized by the Department *as to the law in force in* 1917 and the taxes of oil and gas lessors and lessees under that law.

If this regulation is properly modified as to oil and gas leases there is no earthly reason why the Department regulation and ruling should not be equally modified as to other mining leases. There can be no valid distinction between an oil lease and a mining lease.

The Department has evidently been driven by the injustice of its former rulings to allow an oil lessee a deduction from gross income for depletion. It should clearly be compelled, by the injustice of its previous rulings, to reverse them and allow a mining lessee a like deduction. Why it did not do so as to mining lessees at the same time it did as to oil lessees is a mystery to us, unless it is simply awaiting the impetus thereto to be given by this Court. We trust that if that impetus is necessary it will be given by this Court and as a result thereof the Department will modify its regulations and not continue to insist on its unjust position as to other lessees as it has with us.

The Department says in its brief that it changed its ruling on oil and gas leases and allowed a depletion, because it understood certain of the decisions of this Court to hold "that there was no ownership of the oil or gas in place under the ownership of the land".

First, may it be noted that the decisions to which the Department refers were rendered long before it made its first ruling and regulation under the 1917 law, which it allowed to stand until late in 1922.

Second, if the right to an allowance for depletion rests upon a technical legal title to the substance in place, as the Department now contends, then if there is no ownership of the substance in place, as the Department says as to oil and gas, it must follow that *neither* lessor nor lessee would be entitled to an allowance for depletion. But the Department now, inconsistently with its argument, allows depletion to both lessor and lessee in oil and gas properties, as shown by the amended Article 170 of Regulations 33, as above quoted.

Third, if, as the Department suggests in the next to the last paragraph of its brief, it understood this Court to hold that "ownership of the surface did not give ownership of the oil and gas in place, but that it belonged to the lessee (or other party) who reduced it to possession", then why, to be consistent with its present contention, did it not allow a depletion to a *lessee* of oil and gas wells and *deny* depletion to the *lessor?* Instead, it did allow depletion to both, just as we contend it should do as to mines. The Department can only become consistent in this respect when it makes an allowance for depletion to a lessor and lessee of mines, just as it allows depletion to both lessors and lessees of oil and gas properties, from the 1917 income.

In the petition for the writ in this case the Department states that many returns of mining lessees have been audited under the regulation laid down by the Department and that if this decision is affirmed it will necessitate refunds in considerable amounts. This certainly should have no bearing upon the case. There are many mining lessees' returns for the year 1917 which have not been settled by adjustment with the Department, and the Department has pursued its course with full knowledge of the contentions of taxpayers and in the teeth of the decisions of the District Court in Ohio, the District Court in Minnesota, and the Circuit Court of Appeals for the Eighth Circuit, and we know that many still unsettled cases are awaiting adjustment depending upon this Court's final ruling.

III.

Even should the Court decide that the foregoing propositions are incorrect, still the judgment should be affirmed, since in 1917 the Alworth-Stephens Company had no invested capital or only a nominal capital and properly was assessable under Section 209 of the Act of September 8, 1916, as amended by the Act of October 3, 1917, in force for the year 1917, which would result in at least as large a judgment in its favor.

The foregoing discussion as to depletion relates, of course, generally to the case of any mining lessee. But on the facts applying to this particular Company, the result in dollars and cents is at least as favorable if, as we contend, it falls within the class of companies designated by Section 209 of the Act of September 8, 1916, as amended by the Act of October 3, 1917, in force for the year 1917. This section related to war excess profits tax and is found in 40 Statutes at Large, page 303, and reads as follows:

> "Sec. 209. That in the case of a trade or business having no invested capital or not more than a nominal capital there shall be levied, assessed, collected and paid, in addition to the taxes under existing law and under this Act, in lieu of the tax imposed by section 201, a tax equivalent to eight per centum of the net income of such trade or business in excess of the following deductions: In the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000; in the case of all other trade or business, no deduction."

By the Act of October 3, 1917, Title I of the Act of September 8, 1916, was amended by adding to Part III thereof new sections numbered from 27 to 31, and Section 29 reads as follows:

"Sec. 29. That in assessing income tax the net income embraced in the return shall also be credited with the amount of any excess profits tax imposed by Act of Congress and assessed for the same calendar or fiscal year upon the taxpayer, and, in the case of a member of a partnership, with his proportionate share of such excess profits tax imposed upon the partnership."

Article 860 of Regulations 45, which applied in 1917, issued by the Department, reads as follows:

"Article 860. *Impairment of Capital.* Capital or surplus actually paid in is not required to be reduced because of an impairment of capital in the nature of an operating deficit, *except where there has been, directly or indirectly, a liquidation or return of their investment to the stockholders, in which case full effect must be given to any liquidation of the original capital.*"

Upon the basis of Section 209 and even without allowing *any deduction* from gross income for depletion, the tax of the Alworth-Stephens Company for 1917 would be figured as follows:

Income		$77,505.98
Deduct excess profits tax payable under Section 209, 8% of income in excess of $3,000.00, 8% on $74,505.98, or		5,960.48
Balance of income		$71,545.50
6% on $71,545.50	$4,292.73	
Add excess profits tax	5,960.48	
Total Tax		$10,253.21

The Alworth-Stephens Company made its return for 1917 and paid its tax on the above basis. By an exceedingly curious coincidence, using the 9% discount or risk basis for depletion value, which the lower court adopted, the amount of the tax

which the Alworth-Stephens Company should have paid happens to be exactly the above figure to a cent, which it did pay when it made its return on the basis of Section 209, although the 9% risk basis was decided upon by the District Court in telling us to draw findings without any regard to where the discount rate would land in actual figures, but either method of figuring, either on the depletion basis which the court adopted, or under Section 209, applying to companies with no invested capital or not more than a nominal capital, arrives at the same tax to a cent.

The findings of fact of the lower court, upon which the judgment was based, set out in full the facts upon which the judgment may be sustained, if this Court should deem that the Alworth-Stephens Company should be assessed under Section 209 as a company having no invested capital or not more than a nominal capital. Par. 14 of the findings (Record p. 27) is as follows:

> "14. That the total amount of the net royalties which the plaintiff received from said properties for the year 1917 and which were left and belonged to it after it had paid therefrom all royalties due from it to the fee owners, was $77,505.98, and that it had no receipts during said year from any other source whatsoever. That its invested capital for and during said year 1917 was not to exceed $25,000.00, represented by its certificates of capital stock outstanding, it being true that during the year 1917 said Company did not employ any capital in any operations in its business or to produce its income for said year, and it also being true that prior to 1917 the Company had paid out to its stockholders several times the amount which originally had been put into said Company for said stock, and it being true that if the original $25,000.00 so paid in be considered as being returned to its stockholders ratably per ton as the ore was mined and paid for, according to the total tonnage in the properties, there was left on the 1st of January, 1917, only about $4,500.00 still unreturned, and if it be considered that its invested capital was the total sum

of $40,068.00 expended for exploration, plus the sum of $1,266.86 expended for other small items as set forth in paragraph 3 hereof, which were the only sums it ever spent, and that said sum was returned ratably per ton as the ore was mined and paid for, in proportion to the total tonnage, then said Company, on January 1, 1917, had only about $7,500.00 remaining still undistributed. That from said total net receipts of $77,505.98 for said year 1917 the said plaintiff was entitled to the said reasonable allowance of 71.9% of said receipts as depletion, amounting to $55,726.80, leaving its net taxable income for said year the sum of $21,779.18."

In the memorandum attached to the findings (Record p. 30), the District Court allowed our claim for depletion and assessed us under Section 201 of the law as to war and excess profits, which is the section applying generally to corporations, and the method of computation under that section is set out in Exhibit A attached to the findings of the court (Record p. 29). The method of figuring under that section as required by the law is quite complicated, but the Department has raised no question as to the figures in the Exhibit provided the principle is correct and we are entitled to depletion.

The District Court was of the opinion that the Alworth-Stephens Company in 1917 had an invested capital and more than a nominal capital, and says in its memorandum (Record p. 30):

"I am also of the opinion that the invested capital of the company was in 1917, $25,000, and that that invested capital could not be said to be not more than a nominal capital, and that, therefore, the levy and assessment could not be made under either Sections 209 or 210 of the Act, but must be made under Section 201.

"In short, I am of the opinion that the levy and assessment should have been made by first allowing depletion upon the basis above indicated, and then determining the

amount to be paid by considering the plaintiff as a corporation having an invested capital of $25,000."

Of course, if this Court holds, as we are confident it will, that we are entitled to deduction for depletion, that in itself results in an affirmance, and this argument under the second subdivision of our brief need not be considered. But it would also result in affirmance even if we were not so entitled and in fact in 1917 had no invested capital or only a nominal capital, for, as above pointed out, the figuring arrives at the same identical result in dollars and cents, no difference which claim is sustained, and the findings of the court are sufficient to sustain it if this contention is right.

We maintain on this proposition that the judgment should be sustained under Section 209 on one at least of the three following propositions:

(1) That in 1917 the Alworth-Stephens Company had no invested capital whatsoever, and therefore fell squarely within the provisions of Section 209.

(2) That under the findings of the court and the testimony of the government witnesses, we could not have had more than approximately $4,500.00 capital at the beginning of that year, which, under the law and the decisions, was only a nominal capital as compared with the income of $77,505.98, and therefore we were within the provisions of Section 209.

(3) That even on the extreme contention of the Government and the most unfavorable finding of facts to us, we had no more than $7,500.00 capital in 1917, which was nominal as compared with the income of $77,505.98, and puts us within said Section 209.

1. On the first of the above propositions, the facts as disclosed by the evidence and findings of the court are that there was never paid into this Company by its stockholders anything

more than the $25,000 in cash paid for stock on its organization (Record p. 22). The income tax law was first passed in 1913, the 1909 law being simply an excise tax on corporations for the privilege of doing business. By the end of 1909 there had been paid back to the stockholders and distributed by the Alworth-Stephens Company every cent of the capital that had ever been put into the company, and by 1913 several times this amount had been paid back and distributed to the stockholders (Record p. 24, par. 5). The company, therefore, had paid back to its stockholders, long before the tax amendment to the Constitution became effective, all of the capital which they had ever invested and much more, and we maintain, therefore, that it fell directly within Article 860 of the Regulations as to impairment of capital, above quoted, providing that "where there has been, directly or indirectly, a liquidation or return of their investment to the stockholders, in which case full effect must be given to any liquidation of the original capital". From the beginning of 1913 on, the corporation had no capital invested in its business, but had distributed all the capital which had ever been put into it. It never paid its officers or employes any salaries, had no office rent, no employes and carried on absolutely no business, the only thing done being to collect from its sub-lessees the royalties and pay the fee owners the amount going to them and distribute the balance to its stockholders (Record pp. 27). It was closing its affairs and going out of business as soon as these two mines were exhausted. In 1917 the only assets this company had were the two leases in question, which provided for royalties. *These royalties, being under the decisions, wholly income and being the only assets the company had in* 1917, *it therefore had no invested capital in* 1917 *and no capital.*

It had no other source than these leases out of which to get any money, and if *all the money* that it was to get *was income, then it certainly had no invested capital and no capital.* It is true the original certificates of stock for $25,000 had not been surrendered prior to 1917, but had been left outstanding as a

measure of distribution of these royalties between the stockholders. But the original and only investment of capital had been paid out by the company to its stockholders as early as 1909, and it never thereafter had any invested capital. Under these circumstances the fact that the certificates were still outstanding could certainly not mean more than that its capital was nominal, or in name only. For the actual money represented thereby had long since been paid out of the company into the hands of the stockholders. We therefore say that this particular company on these facts fell squarely within the provisions of Section 209, above quoted, and if so, it paid the full amount of its tax in 1918, and the additional assessment of $17,128.44 which the Government exacted and which the judgment of the District Court provided should be returned, was improperly exacted, and the judgment should be affirmed.

2. The government expert witness, Mr. Simcoe, claimed (Record pp. 68 to 84) that this original $25,000 of paid-in capital should, on some technical theory of accounting, be considered as returned to the stockholders ratably as they received their dividends, according to the number of tons mined each year, as measured by the total number of tons in the property, and his testimony, given after a full examination of the company's books, in substance was that if that theoretical method of distribution of capital were adopted, then there would be, at the beginning of 1917, approximately $4,500.00 of invested capital left. The district court found, in paragraph 14 (Record p. 27), as to that as follows:

> "and it being true that if the original $25,000.00 so paid in be considered as being returned to its stockholders ratably per ton as the ore was mined and paid for, according to the total tonnage in the properties, there was left on the 1st of January, 1917, only about $4,500.00 still unreturned."

Even if this method used by the government expert be adopted, we say that $4,500.00 of invested capital at the begin-

ning of 1917 was entirely nominal as compared with its income for 1917 of $77,505.98 and the income thereafter to be received by the exhaustion of the mines.

3. On the same theory Mr. Simcoe, the government expert, testified that if the invested capital was considered as originally the $25,000, plus about $16,000 additional which the company used for explorations, making a total of about $41,000 so used, was to be considered as having been at some time capital and paid ratably according as the ore was mined as compared to the total ore in the mine, there would be left in 1917 about $7,500.00 of capital undistributed. The court finds as to this (Record p. 27, par. 14):

> "and if it be considered that its invested capital was the total sum of $40,068.00 expended for exploration, plus the sum of $1,266.96 expended for other small items as set forth in paragraph 3 hereof, *which were the only sums it ever spent*, and that said sum was returned ratably per ton as the ore was mined and paid for, in proportion to the total tonnage, then said company, on January 1, 1917, had only about $7,500.00 remaining still undistributed."

The court also finds, in paragraph 9 (Record p. 24), that $17,858.50 of this total sum was in fact returned to the company in 1908 at the time the Perkins sub-lease was granted, on account of the amounts paid for exploration by this company on the property, and that this sum was immediately distributed to its stockholders. Therefore, at least this amount came back to the company in 1908 on account of the very expenditure it had made in that year, and was distributed to the stockholders. It is difficult, therefore, to see how any part of this could be considered as invested capital in 1917, nine years after it had all been paid back. It is only on the most technical theory of bookkeeping that it should be so considered. But even so there would be only about $7,500.00 capital left in 1917, or less than 10% of its receipts from royalties for that year, to say nothing of the

royalties which it would receive in the following years, and this we say was, under the authorities, only a nominal capital, as compared with its income, and the company even in that event was squarely within Section 209.

Furthermore, it is quite difficult to understand, if, as the Government contends, all of this Company's royalties were income, and if in 1917 it had nothing but royalties, and therefore nothing but income, and it did not then or thereafter have any other assets, how it could have any invested capital. If all in the world it owned was, under the decisions, income, then how could any part of the income be invested capital? If the whole is of one kind, how can a part of the whole be just the opposite kind? If the only asset the company had in the world was income, how can any part of that income be invested capital? This Company was not like a corporation which required capital to be kept intact in order to earn and produce income. It had no capital and required none to produce its income. When these leases and sub-leases were made the need for further capital ceased. From then on it was only a collecting and distributing agency, and the distributions completed before the end of 1909 amount to a wiping out and return of its capital. The law itself, in Section 207, defines invested capital as follows:

> "In the case of a corporation or partnership, (1) actual cash paid in, (2) the actual cash value of tangible property paid in other than cash, for stock or shares in such corporation or partnership, at the time of such payment (but in case such tangible property was paid in prior to January 1st, 1914, the actual cash value of such property as of January 1st, 1914, but in no case to exceed the par value of the original stock or shares specifically issued therefor), and (3) paid in or earned surplus and undivided profits used or employed in the business, exclusive of undivided profits earned during the taxable year."

The Alworth-Stephens Company never had any stock issued

for the leases which it took over. The only capital it ever had was cash paid for its shares. It never had any earned or paid-in surplus, because it always paid out to its stockholders, immediately upon receipt, all the income which it received (Record p. 24).

Article 860 of the Regulations, quoted above at length, provides:

> "Where there has been, directly or indirectly, a liquidation or return of their investment to the stockholders, in which case full effect must be given to any liquidation of the original capital."

Giving full effect to the return of the capital to the stockholders and thereby the liquidation of the original capital left this company without any invested capital or capital in 1917, and the company falls squarely within the statute and the regulations of the Department.

The Department has attempted to limit the application of Section 209 of the law to so-called "personal service corporations", without any justification for so doing in the language of the law itself and contrary to its plain meaning. This construction is not adopted by the courts, however. Of course, the ordinary corporation requires some invested capital in order to produce its income. Therefore the statute, before requiring an ordinary corporation to figure war excess profits at all, allowed it to deduct from 7 to 9% upon its invested capital under Section 203 of the statute, and the income of the ordinary corporation, to the extent of 7 to 9% of its invested capital, was subject to no excess profits tax whatsoever. The law-makers evidently considered that there would be some corporations, just like the Alworth-Stephens Company, which had no invested capital or not more than a nominal capital, and for such made the provision that they should pay a flat 8% on whatever income they had, after deducting a flat $3,000 (as a war profits tax, in addition

to the income tax of 6%, on the balance of income after deducting the war profits tax,) making a total of 14%, on all except the deductible items.

In *Delaski vs. Iredell*, 268 Fed. 377, affirmed by the Circuit Court of Appeals in 290 Fed. 955, the plaintiff company had an authorized capital of $100,000, and upon its organization experimented at great expense in the manufacture of automobile tires, and during that time developed a new form of mold for vulcanizing tires, upon which a patent was secured by the company. In 1911 it ceased doing any other business than granting licenses under the patent, and its capital stock was reduced to $10,000. During 1917 its capital was $10,000 and surplus $2,000, which was used as a fund to advance salaries, wages, provide office furniture, accommodations and equipment. The company's entire income for 1917 was $105,650.29, from which the court says it is clear the patents had a real value. The plaintiff claimed that it was entitled to be assessed under Section 209 of the Revenue Act of 1917, as a company having no invested capital or not more than a nominal capital. The Treasury Department denied this right and assessed it under Section 210 of the Act, just the same as the Treasury Department assessed the Alworth-Stephens Company. The court says:

> "The only invested capital of the plaintiff was the $12,000.00 of capital and surplus, which was not used in the production of the net income of the plaintiff, but merely for the purpose of advancing salaries, wages, and providing office accommodations and equipment, and which in itself, under treasury rulings, would not bring the company under section 201 of the act."

The Department made the contention that this Section 209 applied only to lawyers, doctors, professional men and high-salaried officers of corporations—in other words, personal service concerns. The court goes on to show that this could not be the

meaning of the act of Congress and quotes John Stewart Mill's definition of capital, as follows:

> "What capital does for production is to afford shelter, protection, tools, and materials which the work requires, and to feed and otherwise maintain the laborers during the process. Whatever things are destined for this use, destined to supply productive labor with these various prerequisites, are capital."

The court tested the case by this definition and held that the patents of the corporation, which produced the income, did not fall within the term "capital", and held, therefore, that the company had no invested capital and no capital, or not more than a nominal capital and was properly assessed under Section 209 of the law.

The leases which the Alworth-Stephens Company held and which produced the income, and nothing but income, were not capital, any more than the patents in the above case were. The Alworth-Stephens Company had no investment in them which could be treated as invested capital or capital, any more than as though they had been patents capable of producing an income. No investment was required to produce the income.

In *Cartier vs. Doyle*, 277 Fed. 150, the Court of Appeals of the Sixth Circuit held a partnership dealing in lumber assessable for the year 1917 under Seption 209 at 8%, as having no invested capital, where it did its entire business on borrowed money, although it borrowed large amounts. The court points out that under the rule in *Gould vs. Gould*, 245 U. S. 151, a taxing statute will not be extended by implication nor its provisions broadened to embrace matters not specifically covered. In this case, as in ours, considerable amounts had been distributed to the parties before 1917, but the court held the situation existing in 1917 governed.

In *Empire Fuel Co. vs. Hays*, 295 Fed. 704, the court held

that a mining corporation which had borrowed all of its money to purchase its property and for operating expenses had no invested capital and was taxable at the rate of 8% of its income under Section 209, and likewise called attention to the case of *Gould vs. Gould* in this court, holding that it is the rule that courts will not enlarge the operation of a taxing statute so as to embrace matters not specifically covered and will construe a taxing statute in favor of the taxpayer.

In *Porter vs. Lederer*, 267 Fed. 739, the court held that a firm principally engaged in the commission business was properly taxable under Section 209, even though its profits had accumulated until they reached the sum of about $36,000, and even though the firm on account of war conditions actually had more or less isolated transactions in which they bought and sold commodities.

The Department has attempted to assess the Alworth-Stephens Company under Section 210 of the law, which provides for an arbitrary assessment by the Secretary of the Treasury where he is unable in any case satisfactorily to determine the invested capital, and where he is supposed to make the assessment merely by comparison with other representative corporations, partnerships and individuals, without in any manner even disclosing to the taxpayer with what companies the comparison is made. There was absolutely no justification for putting this company under that section. Its records were clear. The facts were absolutely established. If the company had an invested capital the facts were easily ascertainable, and on the facts it is merely a question of whether it had or had not an invested capital. If it had, then we are properly assessable under Section 201 of the law, and if it had not an invested capital, or only a nominal capital, then we fell squarely within Section 209.

It is true that if we are first entitled to a depletion, as hereinbefore argued, and we are next entitled to have the tax assessed under Section 209, our tax would have resulted in only about one-

fourth of the tax which we paid in the first instance and which the lower court has found was due. However, when we put in our return for 1917, the law was new, the war was on, and this company felt that it was paying the highest amount of tax that in any reason could be required of it, and it was not attempting in any manner to shirk its full tax burden. Notwithstanding it did not agree with the rulings of the Department as to depletion, it then paid its tax and supposed that it had done all that in any reason could be expected of it ,and has since been harrassed by the Department through long correspondence and forced to pay this $17,128.44 additional and to bring suit therefor, which has been proceeding through the courts for some four years.

We submit that the judgment must be affirmed.

Respectfully submitted,

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action not inconsistent with this opinion.

LYNCH, EXECUTRIX, ETC. *v.* ALWORTH-STEPHENS COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 273. Argued January 7, 8, 1925.—Decided March 2, 1925.

1. The interest of a corporate lessee of a mine under a lease for a term of years obliging it to mine a minimum tonnage of ore annually and to pay the lessor, owner of the fee, a stated royalty per ton mined, is property within the meaning of § 12a of the Income Tax Law of September 8, 1916, which provides that the net income of corporations organized in the United States shall be ascertained by deducting from gross income, among other things, "a reasonable allowance for the exhaustion . . . of property arising out of its use," and specifically, in the case of mines, "a reasonable allowance

for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year," etc. *United States* v. *Biwabik Mining Co.*, 247 U. S. 116; *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, distinguished. P. 368.

2. As the mining goes on, the property interest of the lessee in the mine, and that of the owner, are lessened, and in both cases the extent of this exhaustion, with the consequent deduction to be made under the above statute, is arrived at by determining the aggregate amount of the depletion of the mine, based upon the market value of the product, and allocating that amount in proportion to the interests of owner and lessee, severally considered. P. 370.

294 Fed. 190, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court (278 Fed. 959) for the present respondent in its action to recover back from an internal revenue collector the amount of an income tax, paid under protest. Upon the death of the defendant, his executrix was substituted.

Mr. Solicitor General Beck and *Mr. Merrill E. Otis*, Special Assistant to the Attorney General, for petitioner.

Mr. W. D. Bailey and *Mr. Horace Andrews*, with whom *Messrs. J. L. Washburn, Oscar Mitchell* and *William P. Belden* were on the briefs, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The federal income tax return made by respondent (a corporation organized in the United States) for the year 1917 showed the sum of $10,253.21 due the government for income and excess war profits taxes for that year; and this amount was paid. Thereafter, the Commissioner of Internal Revenue assessed respondent with an additional tax of $17,128.44, which respondent was forced to pay and did pay under protest, and to recover which this

action was brought against E. J. Lynch, a collector of internal revenue, to whom the payment had been made. Lynch subsequently died and his executrix was substituted as defendant. The federal district court for the district of Minnesota, where the action was brought, rendered judgment in favor of respondent for the amount. 278 Fed. 959. The circuit court of appeals affirmed the judgment, 294 Fed. 190; and the case is here upon certiorari. 264 U. S. 577.

The facts from which the controversy arose, are not in dispute, and, for present purposes, may be shortly stated. Prior to March 1, 1913, respondent had leases upon two definitely described tracts of land in Minnesota containing deposits of iron ore, known as the Perkins mine and the Hudson mine. The leases, unless sooner terminated by the lessee in the manner therein provided, ran for a period of fifty years and obliged respondent to mine and remove at least fifty thousand tons of iron ore annually from the Perkins and twenty-five thousand tons annually from the Hudson and to pay the lessor, owner of the fee, a royalty of thirty cents per ton upon each ton of ore extracted. Respondent subleased the lands upon terms not necessary to be stated further than that the sublessee of the Perkins was to pay respondent a royalty of seventy-five cents per ton and the sublessee of the Hudson a royalty of sixty cents per ton, or forty-five cents and thirty cents, respectively, per ton more than was made payable by respondent to the lessor owner.

Before March 1, 1913, both tracts of land had been fully explored and the deposits of ore therein developed to such an extent that the entire amount of tonnage was known with substantial accuracy, and the properties were demonstrated to be of great value. On that date it was known that these ore bodies would be entirely worked out and the mines exhausted within seven years; and this in fact happened. The market value of the ore in the mines

during that entire time exceeded seventy-five cents per ton; and it sufficiently appears that during such time respondent and its sublessees were in possession of the lands engaged in mining and removing the ore therefrom. Without repeating the formula followed in arriving at the result, it is enough to say that the trial court found that, under the leases, the respondent had a property interest in these ore bodies, the fair market value of which, as of March 1, 1913, was 71.9 per cent. of the total royalties which would be received under the subleases, and such royalties constituted the sole source of respondent's income. Thereupon, the lower courts held that respondent was entitled to deduct from its gross income for 1917 a sum equal to 71.9 per cent. thereof for depletion, and that only the balance remaining was subject to income and excess profits taxes. Such taxes, properly computed, amounted to the sum returned and originally paid by respondent and no more.

The applicable law is found in §§ 2, 10 and 12 (a) of the Act of September 8, 1916, c. 463, 39 Stat. 756, 757–758, 765, 767. Section 10 imposes a tax of two per centum upon the total annual net income received from all sources by every corporation, etc., organized in the United States. Section 12 (a)[1] provides that such net

[1] Sec. 12. (a). In the case of a corporation, joint-stock company or association, or insurance company, organized in the United States, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources—

. . . . . .

Second. All losses actually sustained and charged off within the year and not compensated by insurance or otherwise, including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade; (a) in the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; (b) in the case of mines a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been

income shall be ascertained by deducting from the gross amount of the income, among other things, "a reasonable allowance for the exhaustion . . . of property arising out of its use . . . ; (b) in the case of mines a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made, . . ." Section 2 contains the following provision (p. 758): "(c) For the purpose of ascertaining the gain derived from the sale or other disposition of property, real, personal, or mixed, acquired before March first, nineteen hundred and thirteen, the fair market price or value of such property as of March first, nineteen hundred and thirteen, shall be the basis for determining the amount of such gain derived."

Upon the foregoing facts and under these statutory provisions, the question presented for consideration is whether the relation of respondent to the mines which were the source of its income, was such that it was entitled to deduct from the gross amount of such income a reasonable amount for exhaustion or depletion. Upon the part of the petitioner the contention is that the leases do not convey to the lessee the ore bodies but are contracts of rental conferring only the right to use and occupy the premises and mine the ore, which, so long as it remains in the ground, is the property of the fee owner. It is, therefore, insisted that by the extraction of the ore, only the property of the fee owner is depleted and such owner alone is entitled to an allowance therefor. On the other

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mined and sold during the year for which the return and computation are made, such reasonable allowance to be made in the case of both (a) and (b) under rules and regulations to be prescribed by the Secretary of the Treasury: *Provided*, That when the allowance authorized in (a) and (b) shall equal the capital originally invested, or in case of purchase made prior to March first, nineteen hundred and thirteen, the fair market value as of that date, no further allowance shall be made; . . .

hand, respondent contends that under the leases the lessee, as well as the lessor, owns a valuable property interest in the mines and by the terms of the statute each is entitled to deduct from gross income a reasonable allowance for depletion, the lessee for exhaustion of the leasehold interest and the lessor for exhaustion of the fee interest as lessened by the interest of the lessee, such deduction to be allowed according to the value of the interest of each in the property, the entire allowance, however, not to exceed the total market value in the mine of the product thereof mined and sold during the taxable year.

It is, of course, true that the leases here under review did not convey title to the unextracted ore deposits, *United States* v. *Biwabik Mining Co.*, 247 U. S. 116, 123; but it is equally true that such leases, conferring upon the lessee the exclusive possession of the deposits and the valuable right of removing and reducing the ore to ownership, created a very real and substantial interest therein. See *Hyatt* v. *Vincennes Bank*, 113 U. S. 408, 416; *Ewert* v. *Robinson*, 289 Fed. 740, 746–750. And there can be no doubt that such an interest is property. *Hamilton* v. *Rathbone*, 175 U. S. 414, 421; *Bryant* v. *Kennett*, 113 U. S. 179, 192.

The general provision in § 12 (a), Second, is that the deduction from gross income shall include a reasonable allowance for the "exhaustion . . . of property." There is nothing to suggest that the word "property" is used in any restricted sense. In the case of mines, a specific kind of property, the exhaustion is described as depletion, and is limited to an amount not exceeding the market value in the mine of the product mined and sold during the year. The interest of respondent under its leases in the mines being property, its right to deduct a reasonable allowance for exhaustion of such property, if there be any, during the taxable year results from the

plain terms of the statute, such deduction, since the property is an interest in mines, to be limited to the amount of the exhaustion of respondent's interest caused by the depletion of the mines during the taxable year. We agree with the circuit court of appeals, 294 Fed. 194, that, "The plain, clear and reasonable meaning of the statute seems to be that the reasonable allowance for depletion in case of a mine is to be made to every one whose property right and interest therein has been depleted by the extraction and disposition 'of the product thereof which has been mined and sold during the year for which the return and computation are made.' And the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

It is said that the depletion allowance applies to the physical exhaustion of the ore deposits, and since the title thereto is in the lessor, he alone is entitled to make the deduction. But the fallacy in the syllogism is plain. The deduction for depletion in the case of mines is a special application of the general rule of the statute allowing a deduction for exhaustion of property. While respondent does not own the ore deposits, its right to mine and remove the ore and reduce it to possession and ownership is property within the meaning of the general provision. Obviously, as the process goes on, this property interest of the lessee in the mines is lessened from year to year, as the owner's property interest in the same mines is likewise lessened. There is an exhaustion of property in the one case as in the other; and the extent of it, with the consequent deduction to be made, in each case is to be arrived at in the same way, namely, by determining the aggregate amount of the depletion of the mines in which the several interests inhere, based upon the market

value of the product, and allocating that amount in proportion to the interest of each severally considered.

We are referred to *Weiss* v. *Mohawk Mining Co.*, 264 Fed. 502, where the circuit court of appeals for the sixth circuit reached an exactly opposite conclusion to that announced in the present case by the courts below. The opinion in that case was apparently made to rest upon the decision of this court in *United States* v. *Biwabik Mining Co., supra,* which, in turn, followed *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503. These cases, however, arose under the corporation tax law of 1909, c. 6, 36 Stat. 11, 112, § 38, imposing a special excise tax with respect to the carrying on or doing business by a corporation, etc., measured by its net income, in the ascertainment of which, among other things, there was authorized a deduction of "a reasonable allowance for depreciation of property." The *Sargent Land Co.* case concerned the owner and lessor of mining property, while the *Biwabik Mining Co.* case concerned a lessee of mining property. It was held in both cases, as we hold here, that the leases under consideration did not convey title to the ore in place. Whether the lessees had property interests such as we have determined here, was not considered. Both decisions, expressly in one and implicitly in the other, turned, primarily, upon the scope of the word "depreciation." In the *Sargent Land Co.* case this appears expressly from the following extract (pp. 524–525): "We do not think Congress intended to cover the necessary depreciation of a mine by exhaustion of the ores in determining the income to be assessed under the statute by including such exhaustion within the allowance made for depreciation. It would be a strained use of the term depreciation to say that, where ore is taken from a mine in the operation of the property, depreciation, as generally understood in business circles, follows. True, the value of the mine is lessened from the partial exhaustion of the property, and,

owing to its peculiar character, cannot be replaced. But in no accurate sense can such exhaustion of the body of the ore be deemed depreciation. It is equally true that there seems to be a hardship in taxing such receipts as income, without some deduction arising from the fact that the mining property is being continually reduced by the removal of the minerals. But such consideration will not justify this court in attributing to depreciation a sense which we do not believe Congress intended to give to it in the Act of 1909." And this view is immediately emphasized by putting in contrast with the "depreciation" of the 1909 Act, the "reasonable allowance for the exhaustion . . . of property" of the income tax provision of the Tariff Act of 1913 and the exhaustion and depletion provisions of the Act of 1916, heretofore quoted. "These provisions," the court concluded (p. 525), "were not in the Act of 1909, and, as we have said, we think that Congress, in that act, used the term 'depreciation' in its ordinary and usual significance. We therefore reach the conclusion that no allowance can be made of the character contended for as an item of depreciation."

The decision in the later case of the *Biwabik Mining Co.*, it is true, rests upon the predicate that the lessee was not a purchaser of the ore in place, but that was because the decision of the lower court—that the lease as applied to the situation there developed, was "in every substantial way *pro tanto* a purchase"—presented that question as the one to be met. The lower court thought that the case of the lessor (Sargent Land Co.) was to be distinguished from that of the lessee (Biwabik Mining Co.) upon the theory that, while the royalties paid to the former might properly be called income, the receipts of the latter resulted from the sale of capital assets and were not income. But this court rejected the assumed distinction as unsound and decided the case upon that point without referring to the question of deduction on account

of depreciation. Evidently, it was taken for granted in the lower court that under the decision in the *Sargent Land Co.* case, the latter point was no longer open; and it was passed there, as it was here, without comment. Considering the *Sargent Land Co.* and the *Biwabik Mining Co.* cases together, it is apparent that in respect of the matter of *depreciation* under the Act of 1909, in the opinion of this court, lessor and lessee stood upon the same footing, neither being entitled to an allowance; but it was plainly recognized that if the statutory allowance had been for *exhaustion* or *depletion*, as in the later acts, an entirely different question might have been presented as to both interests. We find nothing in either case out of harmony with the conclusion reached by the lower courts, in respect of the construction and application of the pertinent provisions of law which are now under review.

Affirmed.

MR. JUSTICE BUTLER took no part in the consideration or decision of this cause.